Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

GAMMA-10 PLASTICS, INC.,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In maritime law, the *Tan Hi* doctrine provides that if a carrier charged with delivering goods to a consignee at a foreign port delivers them into the custody of foreign government agents in accordance with the law or custom of the foreign port, the carrier is deemed to have made "proper delivery" and is relieved of responsibility for subsequent damage to the goods. *See Tan Hi v. United States*, 94 F. Supp. 432 (N.D. Cal. 1950).

The questions presented by the present case are:

1. Whether the *Tan Hi* doctrine may be invoked to insulate a carrier from liability for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the damage is caused by the carrier's own mishandling of the goods prior to their delivery into the custody of the local government agents.

2. Whether the *Tan Hi* doctrine may be invoked to insulate a carrier from liability for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the carrier retains control (but not custody) over the goods at all times.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

American President Companies, Ltd. is the parent corporation of American President Lines, Ltd., a wholly owned subsidiary. American President Companies, Ltd. has an interest in the following subsidiaries and affiliates:

- American Consolidation Services, Ltd.
- American President Trucking Company, Ltd.
- APL Information Services, Ltd.
- APL Land Transport Services, Inc.
- Eagle Marine Services, Ltd.
- Natomas Real Estate Company

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The opinion of the United States Court of Appeals for the Eighth Circuit, filed January 22, 1997, affirming the judgment of the district court is reported at 105 F.3d 387 (8th Cir. 1997), and is reprinted in the Appendix, *infra*, at A1 - A11. The decision of the court of appeals, filed March 10, 1997, denying the petition for rehearing, is unreported and is reprinted in the Appendix at A12. The district court's Order and Memorandum Opinion filed August 14, 1995, denying Petitioner's motion for a new trial, is unreported and is reprinted in the Appendix at A13 - A17. The district court's Judgment filed June 8, 1995, reprinted in the Appendix at A18, is unreported.

BASIS FOR JURISDICTION

The court of appeals entered its order on January 22, 1997. The order of the court of appeals denying the petition for rehearing was entered on March 10, 1997. An application for extension of time within which to file a petition for a writ of certiorari was filed on or about May 27, 1997. On June 3, 1997 Justice Thomas extended the time for filing a petition for a writ of certiorari to and including August 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Harter Act, 46 U.S.C. § 190:

> It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. ...

The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1303 (2):

> The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

STATEMENT OF THE CASE

This case arises out of a contract for carriage by sea between Petitioner Gamma-10 Plastics, Inc. (hereinafter referred to as "Gamma-10"), as shipper, and Respondents American President Lines, Ltd. and American President Companies, Ltd. (hereinafter jointly referred to as "APL"), as carrier. APL was to transport Gamma-10's ultra-pure plastic resin from the United States and deliver it to the consignee in The Peoples' Republic of China. The plastic resin was to be shipped in sealed containers to Shanghai, China, by way of Hong Kong, in September/October 1988.

APL accepted Gamma-10's cargo and issued "through", "CY to CY" bills of lading. A "through" bill of lading means that the carrier (here, APL) remains responsible for the cargo from the time the carrier accepts the cargo until the time the consignee takes it at the designated foreign port. "CY to CY" stands for "container yard to container yard." In a CY to CY shipment, the shipper (in this case Gamma-10) puts the goods on pallets in containers provided by the carrier (APL). The container doors are sealed and locked shut by the shipper. The containers are to be transported by the carrier in their sealed condition to the designated port. The cargo is to be delivered in the sealed containers to the consignee. In a container yard to container yard shipment, the containers must stay sealed until the consignee allows the seal to be broken.

In the present case, the Shanghai-bound containers were, upon their arrival in Hong Kong, to be placed by APL on a feeder vessel to carry them to Shanghai. Because the shipment was a "CY to CY" shipment on a through bill of lading, APL was responsible for proper delivery of Gamma-10's cargo in Shanghai in the sealed containers.

APL's own reports for the containers confirm one of Gamma-10's theories of liability; namely, that APL broke the seals and emptied, or "devanned," the sealed containers prior to the

arrival of the shipment in Shanghai, where APL delivered the devanned plastic resin to the local port authority. APL's records indicate that some of the sealed containers were devanned at APL's warehouse in Hong Kong. APL devanned the other sealed containers either at APL's warehouse in Hong Kong, or at some other time either before loading in the United States or after discharge in Hong Kong.[1]

APL's reports and testimony also confirm another of Gamma-10's theories of liability; namely that although the Shanghai port authority received custody of the goods, APL retained control over the goods at all material times.

The devanning caused the subsequent contamination of the entire shipment in Shanghai before the consignee accepted delivery. The consignee therefore rejected the shipment. The resulting financial loss and consequential damages to Gamma-10 forced Gamma-10 out of business.

Gamma-10 filed suit in Minnesota state court against APL, alleging negligence, breach of contract, and misrepresentation. APL removed the case to federal district court pursuant to 28 U.S.C. § 1441, basing the removal upon the district court's original jurisdiction under 28 U.S.C. § 1332.

In the ultimate trial of the case, APL defended in part on the basis of the *Tan Hi* doctrine, which provides a defense for carriers when cargo becomes worthless or lost after delivery into the custody of foreign government agents, if such delivery was in accordance with the law or custom of the foreign port. *See Tan Hi v. United States*, 94 F. Supp. 432 (N.D. Cal. 1950). In its

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[1]Gamma-10 introduced evidence at trial from APL's employees that APL would make more money by devanning the goods as quickly as possible and re-using the containers on return shipments from the Orient, or on other shipments from the United States.

instructions to the jury concerning the application of the *Tan Hi* doctrine, the trial court in essence instructed that the jury must find for APL if APL delivered the cargo into the custody of the governmental agents (named either Sinotrans or PENAVICO) of the Shanghai port, regardless of whether APL had previously removed the cargo from the containers, and regardless of whether APL retained control over the cargo after its delivery into the custody of the governmental agents:

> The bills of lading in this case were through bills requiring delivery to a party in possession of an original bill of lading, the consignee. Therefore, in this case the duty of proper delivery required American President Lines either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the cargo to a port authority; (2) APL in fact delivered Gamma-10's goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of foreign port authority officials, then American President Lines is not liable for any damage or loss that occurred after the port authority took possession.
>
> I instruct you that proper delivery was also made if you find that (1) Sinotrans and PENAVICO are government-controlled agencies acting in an official capacity and outside of the agency or control of APL; (2) APL was required by law or port practices to relinquish the cargo to either agency; (3) APL delivered the cargo into the custody and control of either agency; (4) APL and its agents acted at all times in compliance with port law and port regulations of the foreign port; and (5) the loss or

> damage was accomplished while the goods were in the custody of either Sinotrans or PENAVICO.

Jury Instructions 21 and 21(a), included in the Appendix at A19 - A20.

Thus the *Tan Hi* instruction told the jury that APL had fulfilled its duty to Gamma-10 if APL merely delivered the cargo to the foreign port authority, without regard to whether the cargo was delivered in accordance with the requirement that the cargo be sealed and containerized. The *Tan Hi* instruction also permitted exoneration of APL based upon APL's delivery of custody of the cargo to the foreign port authority, without regard to whether APL relinquished control of the cargo.

Custody of the cargo unquestionably having been delivered to the foreign port authority, and the damage having occurred thereafter through contamination of the uncontainerized plastic resin in Shanghai, the jury found for APL. Gamma-10 moved for a new trial based in part on the *Tan Hi* jury instruction. The trial court denied the motion.

On appeal to the Eighth Circuit, Gamma-10 argued that the trial court's *Tan Hi* jury instruction improperly required the jury to find that APL had fulfilled its duty to Gamma-10 if the damage to the cargo **occurred** after its delivery to the Chinese government agents (which point was uncontested), whether or not the damage was **caused** by APL's prior mistreatment of the cargo. Gamma-10 also argued that the *Tan Hi* instruction erroneously told the jury that APL's delivery of the cargo to the governmental agents exonerated APL from any subsequent loss or damage, regardless of whether APL continued to retain control of the cargo.

The Eighth Circuit affirmed the trial court. The Eighth Circuit's affirmance necessarily means that a carrier is insulated from liability for damage to cargo if the damage **occurs** after a required delivery to foreign government agents, even though the damage was **caused** by the carrier's pre-delivery negligence and

breach of contract. Thus the court of appeals held that the contested jury instructions were acceptable because they allowed liability if the jury found that the damage **occurred before** delivery to the Chinese government agents, despite Gamma-10's argument that even if the damage occurred **after** delivery, APL should be liable because the damage was **caused** by APL's pre-delivery negligence and breach of contract.

The Eighth Circuit's affirmance also means that the *Tan Hi* doctrine applies to relieve carriers of liability for damage to goods even if the carriers, in delivering custody of the goods to foreign port authorities, retain **control** over the goods.

The Eighth Circuit found it significant that the jury instruction stated that APL had a duty to safeguard the cargo. The court of appeals was unpersuaded by Gamma-10's observation that although the jury was instructed that APL had a duty to safeguard the cargo, the same jury instruction told the jury that, whether or not APL safeguarded the cargo, APL could not be liable if the jury found that Chinese law required APL to relinquish the cargo to a port authority, that APL did so, that APL acted in compliance with Chinese law, and that the damage occurred while the goods were in the custody of foreign port authority officials. Because these facts were uncontested for purposes of the theory of liability in question, Gamma-10 argued unsuccessfully to the Eighth Circuit that essentially the trial court erroneously instructed the jury that APL's duty to safeguard the cargo was irrelevant in the circumstances present in this case; namely, where the carrier has given custody (not control) of the goods to a foreign port authority.

The Eighth Circuit further found significant the trial court's instructions to the jury that APL would be liable if Gamma-10 proved not only its contention that APL had failed to take reasonable steps to safeguard the cargo by emptying the cargo from the sealed containers (Instruction No. 22, included in the Appendix hereto at A21), but also that such failure was negligent (Instruction No. 27, included in the Appendix at A22). Again, the

Eighth Circuit was unpersuaded by Gamma-10's argument that the trial court's jury instructions erroneously precluded a finding of negligence. Gamma-10 pointed out that the trial court had improperly instructed the jury that APL did not have a duty to safeguard the cargo if APL met two conditions: (1) delivery of the cargo to the port authority in compliance with Chinese law; and, (2) subsequent occurrence (as opposed to causation) of the damage. Because the jury found that APL met both conditions, the jury could not have found that APL had a duty to safeguard the cargo. Therefore, under the principle that without a duty there cannot be negligence, Gamma-10 argued to the Eighth Circuit, unsuccessfully, that the *Tan Hi* jury instruction precluded a finding of negligence.

Finally, the Eighth Circuit found it significant that the trial court had instructed the jury that Gamma-10 contended that APL had violated Shanghai port law by devanning the cargo (Instruction No. 22), and that if Gamma-10 both proved its contention and proved that APL had been negligent in violating port law, APL would be liable (Instruction No. 27). Gamma-10's theories of liability, however, were not limited to contending that APL had violated port law by devanning the cargo, but, instead, included more importantly the theory that APL had violated the **bill of lading** by devanning the cargo in Hong Kong or elsewhere **before** coming into port at Shanghai.

The Eighth Circuit's decision, which broadly expanded the *Tan Hi* doctrine, precludes a jury from finding negligence or breach of contract where a carrier delivers goods into the custody of a foreign port authority (because, as a matter of law, the jury cannot find the existence of a duty) even where, as here, the carrier admits its own wrongdoing for both pre-discharge and post-discharge conduct.

Gamma-10 now asks this Court to grant certiorari to reverse the decision of the court of appeals.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS ON THE SAME IMPORTANT MATTER.

Federal maritime law provides that an ocean carrier has a duty to make proper delivery of the cargo. *See* 46 U.S.C. §§ 190; 1303(2). "[I]mproper delivery breaches a fundamental duty of the carrier for which there is liability." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994) (hereinafter, "*Schoenbaum*"), § 10-17 n. 1 (1994).

In situations where the carrier is not required to surrender control of the cargo to the foreign port authority, there is no uniform rule among the courts as to the meaning of proper delivery. *See* cases cited, and discussion, in *Schoenbaum*, § 10-17 n. 1.[2]

The lack of uniformity is more severe in situations where a carrier to a foreign port is forced by the law or custom of the port to deliver the cargo into the hands of the foreign port authority. In such situations, there is a well-settled doctrine,

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[2]It has been suggested that the best definition of proper delivery in such situations is that "delivery requires that the consignee (or its agent) should have notice and a reasonable opportunity to inspect, remove the goods, and place them under proper care and custody." *Schoenbaum*, § 10-17 n. 1; *see also Orient Atlantic Parco, Inc. v. Maersk Lines*, 740 F. Supp. 1002 (S.D.N.Y. 1990); James A. Ward, *The Floundering of "Delivery" Under Section 3(6) of COGSA: A Proposal To Steady Its Meaning In Light Of Its Legislative History*, 24 J. Mar. L. & Com. 287 (1993).

known as the *Tan Hi* doctrine, that relieves a carrier from liability for the subsequent damage to the cargo if the law or usage of a foreign port charges the port authorities with the duty to receive cargo and distribute it to the consignees, and the carrier delivers the cargo to the foreign port authorities in conformity with such law or custom. *See Tan Hi v. United States*, 94 F. Supp. 432, 435-36 (N.D. Cal. 1950); *see also Constable v. National S.S. Co.*, 154 U.S. 51, 63 (1894) ("No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility.").

The Circuits are in conflict concerning the scope and meaning of the *Tan Hi* doctrine. By its decision in the case at bar, the United States Court of Appeals for the Eighth Circuit interprets the *Tan Hi* doctrine to relieve a carrier from liability for the carrier's own mistreatment of cargo if the cargo is delivered into the hands of a foreign port authority in accordance with foreign law, and the damage caused by the carrier's mistreatment develops after delivery to the foreign port authority.

The Eighth Circuit also interprets the *Tan Hi* doctrine to exonerate a carrier from damage to cargo that occurs after custody of the cargo is transferred to a foreign port authority, even if the carrier retains control (but not custody) of the cargo.

The Eighth Circuit's interpretation of the *Tan Hi* doctrine is in direct conflict with the basic underpinnings of the doctrine as interpreted by the Fifth and Ninth Circuit Courts of Appeals. As interpreted by those other courts of appeals, the purpose of the *Tan Hi* doctrine is to relieve a carrier of liability where damage occurs because of the intervention of foreign authority over which the carrier has no control. Where damage to cargo occurs because a foreign authority interposes its control over the cargo, it is obviously unfair to impose liability upon a carrier that had no ability to prevent the damage. But where the damage occurs because of the carrier's negligence, the Fifth and Ninth Circuits hold that the *Tan Hi* doctrine does not provide a safe harbor for the carrier. *See F.J. Walker Ltd. v. M/V Lemoncore*, 561 F.2d

1138 (5th Cir. 1977) (*Tan Hi* doctrine did not shield carrier from liability, despite surrender of cargo to foreign port authority, because carrier could have exercised sufficient control over the discharge of cargo to prevent damage); *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981) (*Tan Hi* doctrine applies where carrier was required to surrender the unloading of the vessel to the government organization solely responsible for such port activities, the carrier had nothing further to do with the cargo, and the carrier was powerless to interfere with the exclusive operation of the port by the government organization); *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 300 F.2d 41, 46 (9th Cir. 1962) (where the negligence which causes the loss occurs before the carrier makes proper delivery, the carrier is liable for the loss). *See generally* Judith Meyer, *In Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind*, 9 Mar. Law. 123 (1984); *see also Farrell Lines, Inc. v. Highlands Ins. Co.*, 696 F.2d 28 (2d. Cir. 1982) (Second Circuit holds that carrier is not liable for loss of cargo caused after carrier relinquishes control to local port authority pursuant to custom and regulations of foreign port).

It is important that the conflict between the courts of appeals be resolved. The very purpose of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315, was to establish uniformity in the rights and liabilities of carriers and shippers in international trade. *See Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); *Pan-Am Trade & Credit Corp. v. The Campfire*, 156 F.2d 603, 606 (2d Cir.), cert. denied 329 U.S. 774 (1946).[3] Without a uniform rule, shippers, carriers, and their bankers cannot know their rights, and underwriters cannot calculate their risks. *See* Judith Meyer, *In*

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[3]The other federal maritime statute governing international trade, the Harter Act, 46 U.S.C. 190, *et seq.*, imposes the same duty of proper delivery as does COGSA. *See Schoenbaum*, § 10-17; 46 U.S.C. §§ 190, 1303(2).

Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind, 9 Mar. Law. 123, 125 (1984). Congress passed COGSA and the Harter Act to establish uniformity; the conflict between the Circuit Courts of Appeals has now destroyed uniformity.

Shippers and carriers need a uniform interpretation of the law in order to allocate the risk of loss between them. Only this Court can provide it.

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

"The Harter Act requires a proper delivery of the goods by the carrier, and, if COGSA is applicable, the duty of proper delivery is the same." *Schoenbaum*, § 10-17; *see* 46 U.S.C. §§ 190, 1303(2). "'Delivery' is a crucial concept for several reasons. [One of those reasons is that] improper delivery breaches a fundamental duty of the carrier for which there is liability." *Schoenbaum*, § 10-17 n. 1.

Despite the crucial importance of the concepts of delivery and proper delivery, "[t]here is no statutory definition, no legislative history, little case law, and no Supreme Court ... authority directly on point." *Atlantic Mutual Ins. Cos. v. M/V "Balsa 38,"* 695 F. Supp. 165, 167 (S.D.N.Y. 1988); *see also Sumitomo Corp. of America v. M/V Pennsylvania Rainbow*, 1989 AMC 1467 (N.D. Cal. 1989); *Schoenbaum*, § 10-17 n. 1.

The decision of the court of appeals in the case at bar creates a pressing need for this Court to settle the meaning of "proper delivery." To the extent that compelled relinquishment to port authorities exonerates carriers from the carriers' own negligence, carriers have less incentive to give ordinary care to their cargoes. To the same extent, shippers are more at risk for losses and damage caused by the negligence of their carriers.

The exportation of goods from the United States to foreign ports in 1995 (the last year for which statistics are available) totaled $575,900,000,000. *See* U.S. Department of Commerce, *U.S. Foreign Trade Highlights 1995* at 11 (Aug. 1996). Given the enormous annual volume of exports from the United States to foreign ports, it is vital that this Court settle the meaning of the federal statutory rule for allocating risk between carriers and shippers.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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GAMMA 10 PLASTICS, INC., Appellant,

v.

AMERICAN PRESIDENT LINES, LTD.;
American President Companies, Ltd.,
Appellees.

No. 95-3315.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 25, 1996.

Filed Jan. 22, 1997.

Shipper of cargo of plastic resin which became contaminated after "devanning," or removal from its containers prior to its delivery to consignees, brought negligence and breach of contract suit in state court against ocean carrier. After removal, the United States District Court for the District of Minnesota, Robert G. Renner, J., 839 F.Supp. 1359, granted partial summary judgment in favor of shipper on carrier's affirmative defense of limitations, and judgment on jury verdict for shipper for $500,000. Shipper appealed trial court's refusal to allow claim for punitive damages, and carrier cross-appealed partial summary judgment in favor of shipper. The Court of Appeals, 32 F.3d 1244, affirmed in part, and reversed and remanded in part. On remand, the District Court conducted second trial in which jury returned special verdict in favor of carrier, and shipper appealed denial of its motion for new trial. The Court of Appeals, Wollman, Circuit Judge, held that jury instructions were not erroneous on ground that they precluded jury from finding carrier liable on shipper's theory that

carrier devanned cargo before its arrival in port, resulting in its contamination, as several instructions, including "proper delivery" instruction, required jury to make a determination of when and in whose hands the devanning occurred.

Affirmed.

Kay Nord Hunt, argued, Minneapolis, MN, for appellant.

Michael A. Snyder, argued, Chicago, IL (Shanshan Zhou, Chicago, IL, Richard G. Morgan, Lisa A. Easterling, Minneapolis, MN, on the brief), for appellees.

Before WOLLMAN, ROSS, and MURPHY, Circuit Judges.

WOLLMAN, Circuit Judge.

Gamma 10 Plastics, Inc., (Gamma 10) appeals the district court's[1] denial of its motion for a new trial, contending that the district court rendered erroneous jury instructions. We affirm.

I.

In 1988 Gamma 10 entered into a contract with American President Lines, Ltd., (APL) a large steamship carrier. APL was to transport four separate shipments of

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[1] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

Gamma 10's plastic resin from the United States to various ports in China.[2] Upon receipt of the resin from Gamma 10, APL was to issue "through" bills of lading, meaning that APL would be responsible for the goods until they were received by the consignees in China.

Prior to shipping, the plastic resin was packed in bags, placed on wooden pallets, and covered with shrink-wrap plastic. The wrapped resin was then placed in sealed containers for shipment. The contract provided that these containers were to remain sealed until receipt by the consignee.

The consignees for the first two shipments notified Gamma 10 that they were having trouble locating the goods at the designated ports in China. Because of the problems in locating the first two shipments, Gamma 10 instructed APL to hold the third and fourth shipments in the United States. The third shipment, however, was mistakenly sent to China. When the first two shipments were located, the goods had been "devanned" – removed from their containers – and as a result, the resin was contaminated. Gamma 10 claimed that due to APL's alleged devanning of the first two shipments and its failure to make timely delivery of the goods, Gamma 10 lost buyers for the resin, but was eventually able to resell all four shipments at a lower price.

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[2] The first shipment of five containers was shipped to Whampoa, China; the second shipment of five containers was shipped to Shanghai, China; the third shipment of six containers was shipped to Hong Kong; and the fourth shipment of four containers was held in Los Angeles.

In July of 1990, Gamma 10 filed suit in Minnesota state court. It alleged negligent or intentional misrepresentation and that APL was negligent in shipping, handling, storing, tracking, and protecting Gamma 10's goods, which Gamma 10 claimed was also in breach of their contract. APL removed the case to federal district court. The district court granted partial summary judgment to Gamma 10 on APL's affirmative defense of limitations. After a five-week trial, the jury returned a verdict in favor of Gamma 10 for $500,000. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 839 F.Supp. 1359 (D.Minn.1993).

Gamma 10 appealed the trial court's refusal to allow it to amend its pleadings to claim punitive damages and refusal to instruct on punitive damages. APL cross-appealed the district court's partial summary judgment in favor of Gamma 10. We affirmed the district court's ruling that claims on the second, third, and fourth shipments were not time barred. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244 (8th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1270, 131 L.Ed.2d 148 (1995). However, we reversed as to the first shipment to Whampoa, China, finding that the dispute arising over that shipment was time-barred.[3] We also reversed the district court's holding that Gamma 10 could not amend its pleadings to include a claim for punitive damages and remanded for a new trial.

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[3] Because we held in the first appeal that the claim on the first shipment to Whampoa was time-barred, that shipment was not at issue in the second trial, nor is it in this appeal.

A second trial commenced on April 10, 1995. The jury returned a special verdict on June 7, 1995, in which it found for APL. Gamma 10 moved for a new trial, alleging that the verdict was against the weight of the evidence and that there were erroneous evidentiary rulings and erroneous jury instructions.

II.

Gamma 10 appeals the denial of its motion for a new trial only on the ground that the district court's jury instructions regarding "proper delivery" were erroneous.[4] Gamma 10 advanced three theories of how the containers were devanned. One theory was that the Chinese port authority devanned the containers; a second theory was that APL devanned the containers once the shipment reached Shanghai; a third theory was that APL devanned the cargo prior to its arrival in Shanghai. Gamma 10 argues that the instructions precluded the jury from finding APL liable on this third alternative.

Gamma 10 contends that in order for the jury to be able to find liability based on the third theory, the word "containerized" (as indicated in brackets) should have been included in Instruction No. 21:

> The bills of lading in this case were through bills requiring delivery to a party in possession of an original bill of lading, the consignee. Therefore, in this case the duty of proper delivery required

---

[4] APL contends that Gamma 10 waived this argument, and that in any event it is precluded by the "law of the case" doctrine. In light of our disposition, we need not address these arguments.

> American President Lines either to deliver the [containerized] cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the cargo to a port authority; (2) APL in fact delivered Gamma 10's [containerized] goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of foreign port authority officials, then American President Lines is not liable for any damage or loss that occurred after the port authority took possession.

Gamma 10 makes the same argument with regard to Instruction No. 21a:

> I instruct you that proper delivery was also made if you find that (1) Sinotrans and PENAVICO are government-controlled agencies acting in an official capacity and outside of the agency or control of APL; (2) APL was required by law or port practices to relinquish the cargo to either agency; (3) APL delivered the [containerized] cargo into the custody and control of either agency; (4) APL and its agents acted at all times in compliance with port law and port regulations of the foreign port; and (5) the loss or damage was accomplished while the goods were in the custody of either Sinotrans or PENAVICO.

Gamma 10 argues that to absolve APL from liability, the jury had to find not only that the goods reached the Chinese ports, but also that they were in their containers when delivered. Gamma 10 contends that the instruction as given, without the word "containerized" did not permit the jury to find APL liable as long as the goods were ultimately delivered, in whatever state.

III.

In determining whether a jury instruction is proper, we keep in mind that the district court has " 'wide discretion' " in drafting jury instructions. *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 977 (8th Cir.1995) (quoting *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1212 (8th Cir.1990)) (citation omitted). We must read the jury instructions as a whole and look at the instruction at issue in light of the entire charge. *National Automotive Trading Corp. v. Pioneer Trading Co.*, 46 F.3d 842, 844 (8th Cir.1995) (per curiam). Our review of jury instructions is confined to whether the instructions "fairly and adequately present the issues in the case to the jury." *Hose*, 70 F.3d at 977. As long as " 'the instructions, considered as a whole, adequately and sufficiently state the generally applicable law, the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous.' " *National Automotive*, 46 F.3d at 844 (quoting *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1197 (8th Cir.), *cert. denied*, 460 U.S. 1080, 103 S.Ct. 1767, 76 L.Ed.2d 342 (1983)).

We conclude that when read in their entirety, the instructions were not erroneous. They did not preclude the jury from finding APL liable on Gamma 10's theory that APL devanned the goods before their arrival in Shanghai, but rather required the jury to consider that possibility.

Instruction No. 21 required the jury to find all four of the elements of proper delivery in order to absolve APL from liability. The proper delivery instruction is written in the conjunctive, plainly stating that only if the jury found all four elements, could it find for APL. The fourth element in the proper delivery instruction required the jury to find that "the loss or damage was accomplished while the goods were in the custody of foreign port authority officials." Thus, this part of the instruction required that the jury make a determination of when and in whose hands the devanning occurred.

Likewise, Instruction No. 21a required the jury to find that all five listed circumstances set forth therein existed before absolving APL of liability, which included a finding that "the loss or damage was accomplished while the goods were in the custody of either Sinotrans or PENAVICO." Thus, this instruction also required the jury to consider the circumstances surrounding the devanning of the cargo.

In addition, the jury was aware of Gamma 10's allegations: first, that APL devanned the containers prior to delivery to the Chinese port; second, that the devanning of the containers caused the resin to become contaminated; and third, that it was the contamination which

ultimately resulted in Gamma 10's loss or damage. Therefore, if the jury had believed Gamma 10's allegation that APL devanned the goods prior to arrival at the port, the jury would also have had to conclude that such devanning and the consequent loss or damage occurred when the goods were in the hands of APL. Thus, by making the finding that the loss or damage occurred in the hands of another party and ultimately concluding that APL was not liable, the jury necessarily considered that which Gamma 10 now contends the jury was not given the opportunity to consider – whether APL devanned the goods prior to their arrival at the Chinese port.

The proper delivery instruction, above, also plainly stated that the duty of proper delivery also required APL to "take reasonable steps to safeguard [the cargo] until the shipper or the consignee had a reasonable opportunity to claim the cargo." The court later instructed the jury that one of Gamma 10's theories of negligence was that APL had failed to safeguard by emptying the cargo. Thus, the jury was made aware that devanning the cargo would constitute a failure to safeguard the cargo. Such a failure would constitute improper delivery, which in turn would require the jury to find APL liable on Gamma 10's claim that APL devanned the containers prior to delivery.

Gamma 10 also contends that the trial court merely listed Gamma 10's allegations of negligence without instructing the jury as to how the allegations would lead to a finding of liability. Gamma 10's contention that the court provided no link to liability is unfounded. The court supplemented these allegations by instructing the jury that Gamma 10 would prove the essential elements of its claim if it showed that APL was "negligent in one or

more of the particulars alleged in instruction 22," and that negligence was the "proximate cause of the injury and consequent damage sustained by Gamma 10." Moreover, the jury was asked on the special verdict form whether it found "that the defendants or their agents acted negligently in performing any one or more of the specific acts of negligence alleged by Gamma 10." Instruction No. 22 informed the jury that:

> . . . .
>
> 2. American President lines or its agents failed to take reasonable steps to safeguard Gamma 10's cargo between September and December of 1988 by emptying the cargo from the sealed containers;
>
> . . . .
>
> 4. American President Lines or its agents violated port law, port practices, and port regulations in China by devanning, or emptying, Gamma 10's goods prior to the arrival of a consignee[.]

Taken as a whole, these instructions clearly provided an avenue for the jury to find negligence based on Gamma 10's allegation that APL devanned the goods prior to their arrival in Shanghai.

Similarly, with regard to the breach of contract claim, the jury was informed of Gamma 10's allegations that APL had breached the contract by failing to properly deliver and safeguard, by devanning the containers prior to the consignees' taking possession, and by breaking the seals on the containers. Thus, the jury was fully apprised of Gamma 10's theory regarding breach of contract and

was bound to find APL in breach of its contract if it concluded that Gamma 10's allegations were true.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3315MNST

Gamma 10 Plastics, Inc., Appellant,	*	Appeal from the United States District Court for the District of Minnesota
v.	*	
American President Lines, Ltd., et al, Appellees.	*	

The petition for rehearing filed by the appellant has been considered by the court and is denied.

March 10, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

GAMMA 10 PLASTICS, INC.,

Plaintiff,

v.

AMERICAN PRESIDENT LINES, LTD. and AMERICAN PRESIDENT COMPANIES, LTD.,

Defendants.

ORDER

(Filed Aug. 14, 1995)

Civil No. 3-90-428

The above-entitled action came on for trial before the undersigned and a jury between April 10 and June 5, 1995. On June 7, 1995, the jury returned a verdict for the defendant American President Lines ("APL"). Presently before the court is Plaintiff Gamma 10 Plastics, Inc.'s ("Gamma 10") motion for a new trial.

Gamma 10 claims that a new trial is warranted on the following grounds: 1) the verdict was against the clear weight of the evidence and based upon false evidence; 2) erroneous evidentiary rulings; and 3) prejudicial errors in jury instructions.

Federal Rule of Civil Procedure 59 governs a motion for a new trial. A new trial is appropriate to prevent the verdict from working a substantial injustice, such as where the verdict conflicts with the great weight of the evidence or the record reflects prejudicial error. *Fireman's*

Fund Ins. Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

In granting a new trial on the ground that the verdict is against the weight of the evidence, "[t]he court must be motivated by more than the fact that it would have come to a different conclusion had it been the trier of fact. The court must feel that the jury reached a seriously erroneous result in spite of the clear weight of the evidence." *Leichihman v. Pickwick, Int'l*, 814 F.2d 1263, 1266 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987). A Rule 59 motion may also be granted where the evidentiary rulings were so prejudicial as to require a new trial which likely would produce a different result. *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990).

As to the sufficiency of the evidence, the Court finds that the jury verdict was supported by the clear weight of the evidence and did not result in an injustice. Further, the jury was sufficiently instructed to consider the witnesses' interests, financial or otherwise, when judging their credibility. The determination of the truth or falsity of the evidence was properly left to the jury.

With respect to the alleged evidentiary errors, the evidentiary issues were fully briefed and argued at trial and carefully considered by the Court at that time. The arguments made in connection with the instant motion do not show the Court's earlier rulings to be in error. Accordingly, the identified evidentiary rulings do not warrant a new trial in this matter.

Plaintiff also lists several jury instructions which it claims constituted prejudicial error. Upon review for error, jury instructions must be considered in their

entirety. *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1215 (8th Cir. 1986). The instructions as a whole must state the law fairly and accurately as applied to the evidence presented; "a lack of absolute clarity will not render the instructions erroneous." *Id.*

Of Plaintiff's identified errors in the instructions, only one merits discussion here. Instruction 21 and 21a ("a" representing the second page of instruction 21) incorporates the *Tan Hi* doctrine. *Tan Hi* relieves a carrier of its duty of proper delivery under the Harter Act of foreign law requires the carrier to surrender control of the cargo to the foreign authority. *See Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1252, 1257 (5th Cir. 1983).

To the extent Plaintiff raises objections to this instruction which it failed to raise during trial, they are waived. Instruction 21, in all essential respects, is identical to the *Tan Hi* instruction given in the first trial and upheld on appeal. As the evidence at the second trial again supported the instruction, the Court properly included it.

Further, Instruction 21 represents a fair and accurate statement of the law of proper delivery. All of Plaintiff's sound and fury over the absence of the word "containerized" signifies nothing. Plaintiff argues that the insertion of "containerized" prior to "cargo" in the second paragraph was essential to its theory of liability. Plaintiff argued to the jury that APL devanned the cargo in Hong Kong, before reaching the proper destination of shanghai, and that this premature devanning damaged the cargo.

The instruction as given, without the term "containerized," correctly states the law and, paralleling the instruction from the first trial, constitutes the law of the

case. Moreover, the instruction provided Plaintiff adequate room to argue its theory. Under the requirements set forth in Instruction 21, the loss or damage to the cargo had to be accomplished while the goods were in the custody of the port authority officials. If the jury had found that APL prematurely devanned the cargo in Hong Kong, ultimately causing the damage, proper delivery would not have been made and the *exception would not* apply. The absence of the adjective containerized, therefore, did not result in a misstatement of the law and did not prejudice Gamma 10.

Gamma 10 also claims that the inclusion of Instruction 21a was erroneous and prejudicial. Contrary to Plaintiff's assertions, the first paragraph of page 21a did not constitute a separate, "double dose" of the *Tan Hi* doctrine, but rather a continuation of Instruction 21 as applied to Sinotrans and Penevico. Substantial evidence was presented at trial regarding Sinotrans and Penevico, including testimony to the effect that the entities were government-controlled agencies, warranting an addition to the original instruction.

Gamma 10's primary complaint with respect to Instruction 21a is that the *Tan Hi* exception should not apply to Senotrans or Penevico because they were agents of APL and thus APL did not lose control over the goods as required under the doctrine. The instruction as given, however, presumed or inferred neither that Sinotrans and Penevico were government-controlled, nor that they acted outside of the agency of APL. Rather, the instruction specifically required the jury to make those findings. For the *Tan Hi* doctrine to apply, the jury had to find the following: 1) Sinotrans and Penevico are government-

controlled agencies; 2) they acted in an official capacity; 3) they acted outside of the agency *or control* of APL; 4) APL was required by law or port practices to relinquish the cargo to either agency; 5) APL in fact delivered the cargo into the custody *and control* of either agency; 6) APL *and its agents* acted at all times in compliance with port law and port regulations; and 7) the loss or damage was accomplished while the goods were in the custody of either Sinotrans or Penevico.

The question of the agency relationship was properly left within the province of the jury. If the jury had found that Sinotrans and Penevico acted as agents or under the control of APL as Gamma 10 argued, the exception would not apply. The instruction as a whole fairly and accurately stated the law and thus does not warrant a new trial. The Court similarly finds Plaintiff's objections to the other instructions without merit.

Therefore, based upon all files, records and proceedings herein, Plaintiff's motion for a new trial (Doc. No. 386) is **DENIED.**

Dated: August 14, 1995.

/s/ Robert G. Renner
ROBERT G. RENNER,
Senior Judge
United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gamma 10 Plastics, Inc.

v.

American President Lines, Ltd. and American President Companies, Ltd.

Case No. Civil 3-90-428

JUDGMENT IN A CIVIL CASE

(X) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and the defendants recover of the plaintiff their costs of action.

DATE: June 8, 1995

FRANCIS E. DOSAL,
CLERK

/s/ Robert G. Renner
Robert G. Renner,
Senior Judge

/s/ Denise La Fond
Denise La Fond,
Deputy Clerk

Jury Instruction No. 21:

A carrier such as American President Lines owes to a Shipper such as Gamma-10 the duty to exercise reasonable care to protect the shipper's cargo while the cargo is in its or its agents' possession. A carrier also owes a shipper the duty to "properly deliver" the cargo.

The bills of lading in this case were "through bills" requiring delivery to a party in possession of an original bill of lading (the consignee). Therefore, in this case the duty of proper delivery required American President Lines either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the cargo to a port authority; (2) APL in fact delivered Gamma-10's goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of foreign port authority officials, then American President Lines is not liable for any damage or loss that occurred after the port authority took possession.

Jury Instruction No. 21(a):

I instruct you that proper delivery was also made if you find that (1) Sinotrans and Penevico are government-controlled agencies acting in an official capacity and outside of the agency control of APL; (2) APL was required by law or port practices to relinquish the cargo to either agency; (3) APL delivered the cargo into the custody and control of either agency; (4) APL and its agents acted at all times in compliance with port law and port regulations of the foreign port; and (5) the loss or damage was accomplished while the goods were in the custody of either Sinotrans or Penevico.

Because American President Lines selected the feeder vessel companies that transported Gamma-10's cargo from Hong Kong to Shanghai and Whampoa, these feeder companies were agents of American president Lines at that time. Therefore, American President Lines is responsible for the acts of the feeder vessel companies. You are also to consider that the terminal operators who received the goods in China acted as agents of American President Lines, and their conduct is chargeable to American President Lines unless you find from the greater weight of the evidence that the terminal operator served as the port authority for China in an official capacity.

Jury Instruction No. 22:

Gamma-10 alleges that American President Lines' conduct was negligent in the following particulars:

1. American President Lines or its agents failed to properly deliver Gamma-10's goods in accordance with the terms of the applicable tariffs and bills of lading;

2. American President Lines or its agents failed to take reasonable steps to safeguard Gamma-10's inquiries about the location of its cargo in Shanghai, China between September and December 1988.

3. American President Lines or its agents failed to adequately respond to Gamma-10's inquiries about the location of its cargo in Shanghai, China between September and December 1988.

4. American President Lines or its agents violated port law, port practices, and port regulations in China by devanning, or emptying, Gamma-10's goods prior to the arrival of a consignee; and

5. American President Lines improperly refused to release a portion of the Shanghai cargo unless Gamma-10 paid other bills of lading in China.

Gamma-10 must establish one or more of these particulars by the greater weight of the evidence.

Jury Instruction No. 27:

In order to prove the essential elements of its claim, the burden is on Gamma-10 to establish, by the greater weight of the evidence in the case, the following facts:

FIRST, that American President Lines or its agents were negligent in one or more of the particulars alleged in instruction 22; and

SECOND, that the negligence of American President Lines or its agents was a proximate cause of the injury and consequent damage sustained by Gamma-10.

Supreme Court
FILED
AUG 29 1997
CLERK

(2)

No. 97-228

In The

Supreme Court of the United States

October Term, 1996

GAMMA-10 PLASTICS, INC.,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD. and
AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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25 pp

QUESTION PRESENTED

Respondents submit that neither of the questions framed by the Petitioner is fairly presented by this case and neither presents a justiciable issue.

LIST OF PARTIES

Gamma-10 Plastics, Inc. is a Minnesota corporation having no parent, subsidiaries or affiliates to the knowledge of the Respondent. Gamma's stock is no longer publicly traded.

American President Companies, Ltd. is a publicly held company, the stock of which is traded on the New York Stock Exchange. Its subsidiaries are as follows:

American President Lines, Ltd.
American Consolidation Services, Ltd.
American President Trucking Company, Ltd.
APL Information Services, Ltd.
APL Land Transport Services, Inc.
Eagle Marine Services, Ltd.
Natomas Real Estate Company

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 105 F.3d 387 (8th Cir. 1997) and is reprinted in the Petitioner's Appendix at A1 – A11. The decision of the court of appeals, filed March 10, 1997, denying the petition for rehearing, is unreported but is reprinted in Petitioner's Appendix at A12. The district court's Order and Memorandum Opinion filed August 14, 1995, denying Petitioner's motion for a new trial, is unreported and is reprinted in the Petitioner's Appendix at A13 – A17. The district court's Judgment filed June 8, 1995, is reprinted in the Petitioner's Appendix at A18. The jury's verdict on special interrogatories is reproduced in Respondents' Appendix, *infra*, at A1.

STATEMENT OF THE CASE

Petitioner Gamma-10 Plastics, Inc. (hereinafter "Gamma"), an exporter of recycled poly-propylene resin, claimed that Respondents American President Lines, Ltd. and American President Companies, Ltd. (hereinafter jointly referred to as "APL") lost two of Gamma's shipments of resins in the ports of Whampoa and Shanghai, Peoples Republic of China ("PRC"), and that as a result, Gamma was unable to sell those shipments and another two shipments being held by APL at Gamma's request in the ports of Hong Kong and San Pedro, California.

The evidence proved, however, that Gamma had misrepresented its recycled product as "virgin" plastic resin and when its Hong Kong buyer's customers in the PRC commenced using the first lots (carried earlier by an APL

competitor), they found the resins produced plastic products which were brittle and easily broken. The PRC end users of the resin then refused to take delivery of any of the four shipments already in APL's custody. With no consignees to receive them, the four shipments became frustrated: the first in Whampoa, the second in Shanghai, the third in Hong Kong, and the fourth in San Pedro, California.

Speculating that it would be able to find a substitute buyer, Gamma specifically ordered APL to transship the second shipment from Hong Kong to Shanghai. Gamma failed to promptly find a buyer, however, and when no consignee timely appeared to take delivery, the Shanghai Port Authority took custody of the goods and devanned them. Meanwhile, as time passed and Gamma could find no customers, the resin market price in the PRC was dropping dramatically. None of the four shipments were lost, as Gamma had claimed, and it ultimately sold the first three in the PRC and the fourth in Indonesia.

Gamma's claims against APL with reference to the first (Whampoa) shipment were declared to be time barred by the Eighth Circuit on the first appeal. 32 F.3d 1244, 1250-54 (8th Cir. 1994).

On retrial, the jury unanimously found for APL, specifically that APL did not breach its contract and was not negligent in any of the respects claimed by Gamma. Nevertheless, Gamma continues to allege as if it were the fact that APL improperly devanned[1] the containers before

---

[1] "Devanned" is a trade term meaning to have removed cargo from containers.

the Shanghai shipment was delivered there, a contention the jury resolved against Gamma. Petition at pp. 3-4. Of the many allegations made by Gamma, whether or not APL devanned any of the five Shanghai containers before they were delivered to that port was the most thoroughly litigated factual issue of the case.

Gamma relied solely on some erroneous computer entries made on a container tracking record by APL Hong Kong clerical employees. APL's evidence showed that the entries were not made contemporaneously with the events and that some of the erroneous activity entries had been deleted from the same report on which they were recorded.[2] APL's Hong Kong resident PRC manager, K. K. Cheng, testified unequivocally that APL never carried non-containerized cargo, and, in particular, that the feeder vessel MILD OCEAN, which carried the goods from Hong Kong to Shanghai, never carried non-containerized cargo; and, that goods were delivered to Shanghai in the same containers in which the shipper packed them.[3] Chen Chou Hua, a former employee of Penavico, the PRC state-owned shipping agent in Shanghai, testified that the subject containers arrived full in Shanghai.[4] Alan Hsia, APL's Los Angeles based China market sales representative testified that Victor Chiang, president of Gamma's prospective substitute buyer, Vic International, reported to him in December, 1988, that he and Gamma's president had concluded a trip to China and had found five containers in

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[2] Plaintiff's Trial Exhibits 38, 41, 42, 43, and 45.

[3] Trial Transcript, May 15, 1995, pp. 23-32, 102.

[4] Trial Transcript Vol. XXIX pp. 4297-4298, 4325, 4258.

Huang Pu (Whampoa), five containers in Shanghai and six containers in Hong Kong.[5]

No witness testified the goods were in a devanned condition before they were in the custody of the Shanghai Port Authority. No witness testified that the devanning of the goods by the Shanghai Port Authority resulted in any contamination of the goods or other damage. Nevertheless, Gamma claims "[t]he devanning caused the subsequent contamination of the entire shipment in Shanghai before the consignee accepted delivery. The consignee therefore rejected the shipment." Petition at p. 4. There was no evidence that there even was a "consignee" at any time prior to the ultimate sale in the summer of 1989, more than nine months after the goods had been delivered to Shanghai.

At page 4 of its Petition and within its Statement of the Case, Gamma represents that "APL's reports and testimony also confirm another of Gamma-10's theories of liability; namely that although the Shanghai port authority received custody of the goods, APL retained control over the goods at all material times." APL does not comprehend what Gamma means by the statement that "APL retained control over the goods at all material times." But, whatever it means, this is the first time in over six years of litigation including two trials and two appeals that this theory has been asserted. Furthermore, APL knows of no factual support in the record for such a statement.

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[5] APL Trial Exhibit 71; Trial Transcript Vol. XXV, p. 3646.

At trial, Gamma thoroughly litigated and argued its claims that APL was negligent and breached its contract by devanning the goods prior to their delivery at Shanghai. The jury answered special interrogatories (See Appendix 1, *infra*) specifically finding that APL was not negligent and did not breach its contract of carriage, thus impliedly finding that APL did not devan any goods prior to their arrival at Shanghai. The jury's findings necessarily included its determination that APL did not exercise any "control" over the goods in any sense or context that made it responsible for the Shanghai Port Authority.

On its motion for a new trial, Gamma argued that the jury's findings were against the weight of the evidence, but the district court stated:

> As to the sufficiency of the evidence, the Court finds that the jury verdict was supported by the clear weight of the evidence and did not result in an injustice.

Petitioner's Appendix at A14.

Gamma unsuccessfully moved for a third trial on several grounds. The only issue it preserved for appeal, however, is stated in its Brief of Appellant as follows:

> Where the evidence showed that Respondent APL, the carrier, broke Appellant Gamma 10's cargo out of its sealed containers prior to delivery to the designated port of Shanghai and contrary to the bill of lading and that such action was a proximate cause of the shipper's [Gamma 10's] loss, did the trial court err in instructing the jury that delivery of the cargo to

the Chinese Port Authority was nonetheless a proper delivery?

Gamma claimed that the trial judge erred in not having inserted the word "containerized" where we supply it in bracketed italics in the following instruction:

Jury Instruction No. 21:

A carrier such as American President Lines owes to a shipper such as Gamma-10 the duty to exercise reasonable care to protect the shipper's cargo while the cargo is in its or its agents' possession. A carrier also owes a shipper the duty to "properly deliver" the cargo.

The bills of lading in this case were "through bills" requiring delivery to a party in possession of an original bill of lading (the consignee). Therefore, in this case the duty of proper delivery required American President Lines either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo. But if you find that APL proved by the greater weight of the evidence that (1) the Chinese port practices, customs, regulations, or laws required American President Lines to relinquish the [*containerized*] cargo to a port authority; (2) APL in fact delivered Gamma-10's goods into the custody of the port authority; (3) APL acted at all times in compliance with the port law and port regulations of the foreign port; and (4) the loss or damage was accomplished while the goods were in the custody of the foreign port authority officials, then American President Lines is not liable for any damage or loss that

occurred after the port authority took possession.

The Court of Appeals held only that this instruction, taken with the instructions as a whole, fairly presented Gamma's theory and was not reversible error. 105 F.3d at 389-90. It is of that unremarkable decision that Gamma now seeks this Court's review.

REASONS FOR DENYING THE WRIT

I. GAMMA'S FIRST QUESTION FAILS TO PRESENT A JUSTICIABLE ISSUE BECAUSE IT IS CONTINGENT UPON THE TRUTH OF A PREMISE OF FACT FOUND BY THE JURY TO BE FALSE.

Gamma's Petition purports to present two questions. The first is:

> Whether the *Tan Hi* doctrine[6] may be invoked to insulate a carrier from liability for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the damage is caused by the carrier's own mishandling

[6] The so called "*Tan Hi* doctrine" is derived from the case of *Tan Hi v. U.S.*, 94 F.Supp. 432. Following the Supreme Court's holding in *Constable v. National Steamship Company*, 1894, 154 U.S. 51 at page 63, that "No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility," the *Tan Hi* court held that the common law elements of a "proper" delivery apply only when the custom, regulations, or the law of the port do not otherwise provide.

> of the goods prior to their delivery into the custody of the local government agents.

Gamma's first question is not present at all because it is conditioned upon the erroneous assumption of fact that APL "mishandled" the goods by devanning the Shanghai bound containers of plastic resin before their delivery to that port. The jury rejected this assumption as a matter of fact.

Gamma's jury instruction (No. 22) listed Gamma's contentions on the issue of APL's negligence including:

> 2. American President Lines or its agents failed to take reasonable steps to safeguard Gamma-10's cargo between September and December of 1988 by emptying the cargo from sealed containers;
>
> 4. American President Lines or its agents violated port law, port practices, and port regulations in China by devanning, or emptying, Gamma-10's goods prior to the arrival of a consignee;[7]

Gamma's burden of proof instruction, no. 27, provided:

> In order to prove the essential elements of its claim, the burden is on Gamma-10 to establish, by the greater weight of the evidence in the case, the following facts:
>
> **FIRST**, that American President Lines or its agents were negligent in one or more of the particulars alleged in instruction 22; and

---

[7] Trial Transcript Vol. XXXIV, pp. 4858-59.

> **SECOND**, that the negligence of American President Lines or its agents was a proximate cause of the injury and consequent damage sustained by Gamma-10.[8]

A proximate cause instruction, to which no objection was taken, was also given.[9]

Gamma's jury instruction on the issue of APL's breach of contract included:

> . . . Gamma 10 claims that American President Lines breached the contract of carriage by failing to properly deliver and safeguard the cargo, by devanning containers in a container yard to container yard contract before the consignee claimed the cargo; and by breaking the seals identified on the bill of lading without the permission of Gamma 10 or its consignee.[10]

In closing, Gamma's counsel argued that APL "dumped out the containers, which, in and of itself, was a breach of contract and negligence" and "the fact that they violated port law by dumping those containers before they got to Shanghai is a presumption of negligence."[11]

The jury returned its verdict on special interrogatories. App. 1. It answered "no" to the question of whether APL was negligent and "no" to the question of whether APL breached its contract of carriage. When considered in light of the above quoted jury instructions and Gamma's counsel's argument, the verdict necessarily

---

[8] Trial Transcript Vol. XXXIV, p. 4862.

[9] Trial Transcript Vol. XXXIV, pp. 4862-63.

[10] Trial Transcript Vol. XXXIV, pp. 4863-64.

[11] Trial Transcript Vol. XXXIV, pp. 4815-16.

included findings by the jury that APL did not devan the subject containers or otherwise negligently handle them, or breach any of its statutory, common law or contractual duties. Therefore, conditioned as it is upon an erroneous premise, Gamma's first question is not presented and fails to establish the existence of a justiciable case or controversy. A Writ of Certiorari to examine the first question would be clearly inappropriate.

II. THE DECISION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND NINTH CIRCUITS.

The Eighth Circuit concludes in its opinion that:

> . . . when read in their entirety, the instructions were not erroneous. They did not preclude the jury from finding APL liable on Gamma 10's theory that APL devanned the goods before their arrival in Shanghai, but rather required the jury to consider that possibility.
>
> . . .
>
> Taken as a whole, these instructions (paragraphs 2 and 4 of Instruction no. 22) clearly provided an avenue for the jury to find negligence based on Gamma 10's allegation that APL devanned the goods prior to their arrival in Shanghai.
>
> Similarly, with regard to the breach of contract claim, the jury was informed of Gamma 10's allegations that APL had breached its contract by failing to properly deliver and safeguard, by devanning the containers prior to the consignees' taking possession, and by breaking the seals on the containers. Thus, the jury was

> fully apprised of Gamma 10's theory regarding breach of contract and was bound to find APL in breach of its contract if it concluded that Gamma 10's allegations were true.

105 F.3d 387 at 389-90.

Gamma attempts to create a conflict of law among the Circuit Courts of Appeal by claiming that "[t]he Eighth Circuit's affirmance means that a carrier is insulated from liability for damage to cargo if the damage **occurs** after a required delivery to foreign government agents, even though the damage was **caused** by the carrier's pre-delivery negligence and breach of contract." Petition at pp. 6-7. Nothing in the opinion of the Eighth Circuit can be construed as holding that a carrier who is negligent or breaches its contract of carriage is relieved of liability, if such negligence or breach proximately causes damage to cargo while subsequently in the custody of a government authority. On the contrary, as the passage above quoted shows, the basis of the Court's affirmance was that the instructions, taken as a whole, preserved Gamma's right of recovery, if it proved negligence or breach on the part of APL, which caused subsequent damage to the goods while they were in the custody of the Shanghai Port Authority.

Similarly, nothing in the Court's opinion can be construed as an interpretation by the Eighth Circuit of the *Tan Hi* doctrine that a carrier is relieved from liability for negligent mistreatment of cargo if the cargo is delivered into the hands of a foreign port authority in accordance with foreign law, and the damage caused by the carrier's mistreatment develops after delivery to the foreign port authority. The Eighth Circuit neither expressed nor

implied any such thing and Gamma's contention to the contrary is belied by simply reading the opinion.

The Eighth Circuit does not even mention or cite *Tan Hi*; nevertheless, Gamma claims that its "interpretation of the *Tan Hi* doctrine is in direct conflict with the basic underpinnings of the doctrine as interpreted by the Fifth and Ninth Circuit Courts of Appeals." The Fifth Circuit case Gamma relies upon is *F. J. Walker Ltd. v. M/V* LEMONCORE, 561 F.2d 1138 (5th Cir. 1977). Gamma cites LEMONCORE for the proposition that the *Tan Hi* doctrine did not shield the carrier from liability, despite surrender of cargo to a foreign port authority, because the carrier could have exercised sufficient control over the discharge of cargo to prevent damage. However, no governmental authority was involved in the LEMONCORE case, and *Tan Hi* was cited only for the proposition that under the Harter Act, proper delivery occurred when made consistently with the customs of the port. The carrier did not claim the benefit of the *Tan Hi* doctrine, and that issue was not before the court. Clearly, a conflict with the *Tan Hi* doctrine cannot be generated between this case and LEMONCORE when neither case relied upon or involved the doctrine.

In LEMONCORE, the shipowner hurried to discharge the ship of its frozen meat cargo at a Tampa, Florida commercial terminal in anticipation of a longshoremen strike even though it knew discharge was being accomplished faster than the stevedore could remove the frozen meat from ship's side to refrigerated trucks. The meat thawed on the dock and the shipowner was found liable on these two grounds: it did not discharge the cargo to a fit and proper wharf; and, it was negligent in not discharging the

cargo in accordance with the custom and usage of the port because the bedloading of trucks by hand, a common occurrence at the port, was much slower than the ship's rapid discharge permitted. "[T]he carrier's refusal to permit this temporary cessation of discharge violated the customs of the port." 561 F.2d at 1144. No reasonable mind can find any conflict between *Lemoncore* and the Eighth Circuit's opinion in this case as the law of the two cases is consistent.

Gamma's apparent reliance upon the Fifth Circuit's decision in *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981) is baffling because it fully supports APL in this case. Imparca Lines discharged a container load of electronic goods in Venezuela where the National Institute of Ports ("INP") is responsible for all operations of a seaport including stevedoring, warehousing and receiving and delivering cargo. The container was discharged from the ship but could not be found by INP. The district court found for the cargo underwriter and against the ship, holding that the container had not been delivered.

The Fifth Circuit, however, found the district court's findings of fact to be inherently inconsistent. It reversed and remanded the case with instructions to dismiss the shipowner. It concluded that the finding that the container had been placed on the dock was supported by the evidence, but that the district court erred in its legal conclusion that the container was not "delivered." The court cited *Tan Hi* and *Lemoncore* for the proposition that "a carrier's delivery to persons charged by the law and usage of the port with the duty to receive cargo and

distribute it to the consignee is a good delivery on the part of the carrier."[12] The Court reasoned:

> The evidence in this case shows that the INP is an organization of the Venezuelan government which has the sole responsibility of unloading, storing and delivering all cargo destined for Puerto Cabello. In other words, once the unloading of the cargo from the vessel commenced, the carrier had nothing further to do with the cargo. And, indeed, the evidence shows that the carrier was powerless to interfere with the exclusive operation of the port by the INP.

The court then held:

> We conclude that the point of delivery as defined by the bill of lading coincides with the point of delivery as defined by the Harter Act and the case law. In this case, the delivery occurred, at the latest, when the cargo was placed on the dock in the custody of INP the point described in the bill of lading which coincides with the custom and usage of delivery at that port the point described by the case law. We conclude the evidence overwhelmingly supports the district court's finding of fact that the container was unloaded from the vessel and placed on the dock in the control of INP. This constitutes delivery as a matter of law, in accordance with the bill of lading and the custom and usage of the port. The district court's legal conclusion that delivery never occurred is thus in error, and is accordingly reversed. Delivery had taken place, and the carrier's responsibility for the

---

[12] 561 F.2d at 1144.

> goods was discharged before the container disappeared, and accordingly, the district court shall on remand enter judgment for Imparca.

646 F.2d at 168-169. Clearly, there is nothing in the Eighth Circuit's opinion in this case which conflicts with the above holding in *Allstate v. Imparca Line*, because in both cases the carriers were not found to have been negligent and in both cases the carriers were found to have made proper deliveries in accordance with the customs of the respective ports.

The Ninth Circuit case claimed by Gamma to be in conflict with the Eighth Circuit's decision in this case is *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 300 F.2d 41, 46 (9th Cir. 1962). *Isthmian*, however, is not at all in conflict with the Eighth Circuit, and furthermore, it is inapposite to this case. *Isthmian* did not involve a foreign governmental port authority or agency, but rather the validity of a carrier's clause in its bill of lading which purported to give it the liberty of discharging cargo to barges when no wharf was available. In *Isthmian*, the shipowner discharged the goods into an unseaworthy barge for on-carriage to shore. The shipowner was found to have been negligent for discharging the cargo into an unseaworthy barge and liable for the subsequent loss of cargo when the unseaworthy barge sank. The Ninth Circuit held that the delivery had not been accomplished by landing the cargo into the barge because the carrier had not demanded receipts for the cargo from the lightering company or demanded surrender of the negotiable order bill of lading. Again, it is clear from the Eighth Circuit's decision that if Gamma had proven that APL was guilty

of some negligence or breach of contract, which manifested itself in damage to the cargo after delivery to the Shanghai container yard, APL would have been found liable. In *Isthmian*, pre-delivery negligence on the part of the carrier was found, in this case it was not. These distinguishing facts further preclude any possibility that the Eighth Circuit's decision is in conflict with *Isthmian*.

Having shown that there are no conflicts between the decisions of the the Fifth and Ninth Circuit cases cited by Gamma and the decision of the Eighth Circuit in this case, there is no need or utility in the Supreme Court's granting a Writ of Certiorari. There is simply no uncertainty in the law requiring any reconciliation.

III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS NOT DECIDED ANY IMPORTANT QUESTION OF FEDERAL LAW.

Gamma's second question is:

> 2. Whether the *Tan Hi* doctrine may be invoked to insulate a carrier from liability for subsequent damage to goods delivered in the custody of government agents in accordance with the law of the foreign port, when the carrier retains control (but not custody) over the goods at all times.

Gamma does not explain what it means by the phrase: "when the carrier retains control (but not custody) over the goods at all times," and it refers to no evidence which would support the contention that APL

retained "control" of the goods after delivery to the container yard in Shanghai. This confused "issue" is being raised for the first time in Gamma's Petition for a Writ of Certiorari. No issue was presented below that involved any alleged liability by reason of any continuing "control" on the part of APL. That contention does not appear in Gamma's Complaint or Amended Complaint; it was not litigated in either the first or second trial; and, it was neither briefed nor argued in either the first or the second appeal. The Eighth Circuit's decision, from which Gamma's Petition is spawned, does not address the question because it was never raised. Absent exceptional circumstances, the Supreme Court will not consider an argument which was not raised in the district court or in the court of appeals. *U.S. v. Lovasco*, 97 S.Ct. 2044, 2048 n. 7, 431 U.S. 783, 788 n 7, 52 L.Ed.2d 752 (1977). No exceptional circumstances having been shown, the Court should disregard Petitioner's second question.

The Eighth Circuit did not hold that carriers are exonerated from their own negligence by relinquishing cargo to government authorities as required by local law or the custom and usage of the port.

The definition of "delivery" *per se* was not an issue in this case below and the Eighth Circuit did not define "delivery." It would be inappropriate for the Supreme Court to undertake to "settle the meaning of the federal statutory rule for allocating risk between carriers and shippers," as requested at page 13 of Gamma's Petition, because it could only do so in an advisory or hypothetical context. Furthermore, what constitutes a proper delivery may vary by contract or custom and usage of the port so long as no contractual definition runs afoul of the Harter

Act[13] or the Carriage of Goods by Sea Act.[14] It would be virtually impossible for any court to define what constitutes a proper delivery of cargo in the abstract, for such definition would have to encompass all cargoes, in all trades, to all ports. Not only would it be impossible as a practical matter, but it would impinge prospectively upon the plenary power of the Congress under the Commerce Clause[15] to enact or amend laws regarding such matters.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Dated: August 28, 1997.

Respectfully submitted,

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[13] 46 U.S.C. §190 et seq.

[14] 46 U.S.C. §1300, et seq.

[15] United States Constitution, Article 1, §8.

APPENDIX 1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Gamma 10 Plastics, Inc.,

Plaintiff,

v.

American President Lines, Ltd. and American President Companies, Ltd.,

Defendants.

Civil No. 3-90-428

SPECIAL VERDICT FORM

We, the jury, in the above-entitled action, for our special verdict answer the questions submitted to us as follows:

QUESTION NO. 1 Do you find from the greater weight of the evidence that the defendants or their agents acted negligently in performing any one or more of the specific acts of negligence alleged by Gamma 10?

YES _ **NO** X

If you answered "No" to Question No. 1, do not answer Question No. 2.

QUESTION NO. 2 Do you find from the greater weight of the evidence that the defendants' negligence was either the sole proximate cause or a contributing proximate cause of the damages Gamma 10 claims?

YES _ NO _

QUESTION NO. 3 Do you find from the greater weight of the evidence that the defendants or their agents breached their contract for the carriage of Gamma 10's goods to China during 1988?

YES _ NO X

QUESTION NO. 4 If you answered "Yes" to Questions 1 and 2, or 3, what amount, if any, will compensate Gamma 10 for the damages it suffered as a result of the defendants' negligence or breach of contract?

$ (NA)

QUESTION NO. 5 Do you find from the greater weight of the evidence that the defendants acted with a deliberate or wanton disregard for the plaintiff's rights?

YES _ NO X

DATED: June 7, 1995

/s/ Illegible
Foreperson

Concurring jurors sign below only if there is a 8/9 verdict:

_____ _____

_____ _____

_____ _____

_____ _____

_____

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No. 97-228

In The

Supreme Court of the United States

October Term 1996

GAMMA-10 PLASTICS, INC.

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD. and
AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT'S OBJECTION TO THE MOTION OF THOMAS SCHOENBAUM TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The respondents, American President Lines, Ltd. and American President Companies, Ltd. object to the motion of Thomas Schoenbaum to file his proposed amicus curiae brief in support of Gamma-10 Plastics Inc.'s petition for a writ of certiorari for the following reasons..

As admitted in footnote no. 1 to his Statement of Interest, Professor Schoenbaum was the plaintiff's paid expert on admiralty law in the district court, and counsel for the petitioner wrote at least part of his motion and brief. "Petitioner will be paying the cost of printing and serving this brief." Clearly, this is a case of a co-counsel attempting to cloak himself as amicus curiae.

Furthermore, contentions of fact contained in his statement of the case, such as "[i]t is also undisputed that the goods were damaged because they were "devanned" (removed from the container in which they were packed) and left out in the open," are simply false. There was no evidence that the Shanghai shipment, which was the only subject of the appeal to the Eighth Circuit, was ever left out in the open, or that it was damaged at the time it was removed from the custody of the Shanghai Port Authority. No witness testified who claimed to have even seen the goods while they were in the custody of the Shanghai Port Authority or at the time of their removal from its custody.

In section III of his Brief he claims Jury Instruction No. 21 was erroneous because it failed to state that the carrier had a duty to notify the shipper/consignee of the cargo's arrival. Notification was never an issue raised by the plaintiff in the district court and it was never an issue on the plaintiff's appeal to the Eighth Circuit. An amicus curiae is not permitted to broaden the scope of an appeal by raising issues that have not been presented by the parties to the appeal. *Resident Council of Allen Parkway Village v. U.S. Dept. of HUD*, 980 F.2d 14043, 1048-1050

(5th Cir. 1993), *certiorari denied*, 114 S.Ct. 75, 510 U.S. 820, 126 L.Ed. 2d 43; *Preservation Coalition v. Pierce*, 667 F.2d 851, 861-862 (9th Cir. 1982).

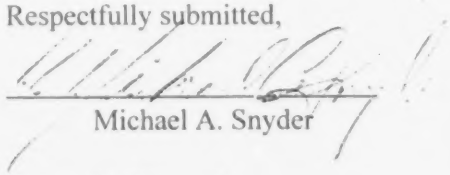
Finally, Professor Schoenbaum erroneously states that Jury Instruction No. 21 fails to state that the duty of proper delivery means that the carrier has an affirmative duty of due care to protect the goods against loss or damage. Apparently, Professor Schoenbaum has never read Jury Instruction No. 21 because the first two sentences of the second paragraph state the following:

> The bills of lading in this case were "through bills" requiring delivery to a party in possession of an original bill of lading (the consignee). Therefore, in this case the duty of proper delivery required American President Lines either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or the consignee had a reasonable opportunity to claim the cargo.

CONCLUSION

For the foregoing reasons, the motion of Professor Thomas Schoenbaum to file a brief in support of the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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Certificate of Service

I, Michael A. Snyder, counsel for the respondents, certify that I mailed true copies of the foregoing Objection of Respondents to the Motion of Thomas Schoenbaum to file an amicus brief in support of the Petitioner's Petition for a Writ of Certiorari, on this 12th day of September, 1997, to each of the following:

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September 12, 1997

Clerk of the
Supreme Court of the United States
One First Street N.E.
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**Re: Gamma-10 Plastics, Inc., Petitioner, vs.
American President Lines, Ltd. and
American President Companies, Ltd., Respondents
No. 97-228 October Term 1996**

Dear Clerk:

I enclose the original and eleven (11) copies of Respondent's Objection To The Motion Of Thomas Schoenbaum To File Amicus Curiae Brief In Support Of The Petition For A Writ of Certiorari. Will you please file this and return one court receipted copy in the enclosed self-addressed stamped envelope? Thank you very much for your cooperation in the foregoing.

Very truly yours,

RAY, ROBINSON, CARLE, DAVIES & SNYDER

Michael A. Snyder

MAS:mcs

Enclosures

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No. 97-228

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

GAMMA-10 PLASTICS, INC.,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF PROFESSOR THOMAS J. SCHOENBAUM

In Support of the Position of Petitioner

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16 pp

THOMAS J. SCHOENBAUM'S MOTION TO FILE AN *AMICUS CURIAE* BRIEF

I, Thomas J. Schoenbaum, hereby respectfully move this honorable Court for an Order permitting me to file an *amicus curiae* brief in the above-captioned matter on behalf of the petitioner. The respondents, American President Lines, Ltd., and American President Lines Companies, Ltd., refuse to give written consent to my participation.

My interest in this case is sincere. I am the Executive Director of the Dean Rusk Center for International and Comparative Law at the University of Georgia, a Professor of Law at the University of Georgia School of Law, and the author of the treatise *Admiralty and Maritime Law* (West, 2d ed. 1994). I am deeply concerned about the proper development of maritime law.

The decision of the United States Court of Appeals for the Eighth Circuit creates a conflict among the Circuits concerning an important issue of maritime law and opens the door to exoneration of ocean carriers for their negligence and breach of contract in a manner contrary to Congress's intent in both the Harter Act, 46 U.S.C. § 190, and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e).

For these reasons, I respectfully ask this Court to issue an Order allowing me to file the attached *amicus curiae* brief in this case.

THOMAS J. SCHOENBAUM
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STATEMENT OF INTEREST OF THOMAS J. SCHOENBAUM

I appear in this case as *amicus curiae*.[1] I am the Executive Director of the Dean Rusk Center for International and Comparative Law at the University of Georgia, a Professor of Law at the University of Georgia School of Law, and the author of the treatise *Admiralty and Maritime Law* (West, 2d ed. 1994). I am an attorney who for more than the immediately preceding three years has been admitted to practice in the highest courts of the States of Georgia, North Carolina, Louisiana, and Illinois.

My interest in this case is the preservation of a fair allocation of risk between ocean shippers and ocean carriers in accordance with Congressional intent as expressed in both the Harter Act, 46 U.S.C. § 190, and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e). The decision of the

---

[1]The position presented in this brief is solely my own. It does not necessarily represent the position, if any, of the Dean Rusk Center for International and Comparative Law or of the University of Georgia School of Law.

Pursuant to Supreme Court Rule 37.6, I state that I authored this brief in whole, with the exception that counsel for petitioner informed me of the need for, and assisted me with, this footnote and made editorial suggestions concerning the main text, some of which I adopted. Petitioner will be paying the cost of printing and serving this brief.

I have no involvement with the above-captioned matter other than having served as an expert witness at the request of plaintiff's counsel in the federal district court. For this service I was paid a fee. I do not represent any party in this case at the present time and I did not and will not receive any fee or expenses in return for preparing this *amicus curiae* brief.

United States Court of Appeals for the Eighth Circuit allows ocean carriers, who generally have superior bargaining power over shippers, to be exonerated from their own negligence and breach of contract in circumstances where goods are shipped to a foreign port controlled by foreign port authorities. This important decision not only creates a vast exception to the allocation of risk set forth in the Harter Act and the Carriage of Goods by Sea Act, but also creates a conflict among the Circuits concerning a significant issue of maritime law.

STATEMENT OF THE CASE

This case, *Gamma 10 Plastics v. American President Lines*, 105 F.2d 387 (8th Cir. 1997), involves the important and interesting matter of the conflict between the carrier's duty under both *The Harter Act*, 46 U.S.C. § 190, and *The Carriage of Goods by Sea Act* (COGSA), 46 U.S.C. § 1301(e), to properly deliver goods entrusted to it, and the doctrine that a carrier can disclaim responsibility when it turns cargo over to foreign port authorities under mandatory port regulations.

It is not disputed that in this case the goods carried by the carrier, American President Lines (APL), were damaged. It is also undisputed that the goods were damaged because they were "devanned" (removed from the container in which they were packed) and left out in the open. The only dispute is who devanned the goods and when. Gamma 10 contends the goods were devanned by APL prior to the arrival of the cargo in Shanghai; APL contends that the goods were devanned by either the Chinese port authorities or APL after the shipment reached Shanghai in compliance with mandatory port regulations.

Though the jury did not find who devanned the goods or when, it found in favor of APL. However, the jury instructions under which the jury deliberated were confusing and a misstatement of what the law should be relating to the carrier's duty of proper delivery in a case involving mandatory port regulations. The Eighth Circuit's affirmance of those instructions creates a serious conflict among the courts of appeals and an unsound rule of law that the Supreme Court should correct.

REASONS FOR GRANTING THE WRIT

I. THE JURY INSTRUCTIONS INDICATE THAT THE CARRIER IS EXONERATED FROM ITS NEGLIGENCE AND BREACH OF CONTRACT BY COMPLIANCE WITH MANDATORY PORT REGULATIONS

The jury instructions given in this case mean that the carrier is exonerated from responsibility for damaged cargo by compliance with mandatory port regulations. In other words, the jury instructions virtually command that a carrier complying with mandatory port regulations cannot be negligent and cannot be in breach of contract. Both Instructions 21 and 21A, read as a whole, create this understanding.

This is dangerous precedent. It opens the door to exoneration of ocean carriers for their negligence and breach of contract in a manner diametrically opposed to Congress's intent in both *The Harter Act*, 46 U.S.C. § 190, and *The Carriage of Goods by Sea Act* (COGSA), 46 U.S.C. § 1301(e). The duty of delivery is a non-delegable duty of the carrier. The carrier is normally strictly liable for misdelivered goods and is responsible for those acting as its agents. *David Crystal Inc. v. Cunard Steamship Co.*, 339 F.2d 295, 298 (2d Cir. 1964); *Sprague & Rhodes Commodity v. M/V Procer Fulgencio Yegros*, 617 F. Supp. 911, 1985 AMC 2041 (S.D.N.Y. 1985). A clause in a bill of lading that relieves the carrier from liability for improper delivery is void by operation of law. *Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985).

In this case both Instructions 21 and 21A state that, in effect, APL is exonerated if APL complied with port

regulations and the damage occurred while the goods were in the custody of port officials. Neither instruction mentions that proper delivery is a non-delegable duty and that APL certainly remains responsible, at a minimum, for damage caused by its negligence or breach of contract. It is true that a separate Instruction 22 does state that Gamma 10 would prove its claim if it showed that APL was negligent and the negligence was the proximate cause of the damages to the cargo. But this instruction has to do with the proof of the elements of the claim, not with the legal effect of the mandatory port regulations. Instructions 21 and 21A, which are directed to this issue, have the effect of stating that the carrier is exonerated from responsibility for its own negligence and breach of contract by compliance with the port regulations.

II. THE EIGHTH CIRCUIT COURT OF APPEALS HAS ADOPTED A BROAD AND INCORRECT RULE WITH REGARD TO THE EFFECT OF COMPLIANCE WITH MANDATORY PORT REGULATIONS THAT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The Eighth Circuit in this case has adopted a broad view of compliance with mandatory port regulations that conflicts with decisions in other Circuits. The source of the doctrine appears to be *Tan Hi v. United States*, 94 F. Supp. 432, 435-36 (N.D. Cal. 1950) following dicta contained in a decision of this court, *Constable v. National S.S. Co.*, 154 U.S. 51, 53 (1894).

The *Tan Hi* court, however, clearly did not imply that following port regulations creates a safe harbor; rather the rule is a small exception to the duty of proper delivery. *See Tapeo Nigeria Ltd. v. M/V Westwind*, 702 F.2d 1252 (5th Cir. 1983); and *Note*, *In Another Country: The Effect Of Mandatory Port Law Upon Statutory Duties Of Discharge And Delivery -- Tapco Nigeria v. M/V Westwind*, 9 Mar. Law. 123 (1984).

Decisions in other circuits have construed *Tan Hi* narrowly: the carrier remains liable where damage occurred due to the carrier's negligence. *See F.J. Walker Ltd. v. M/V Lemoncore*, 561 F.2d 1138 (5th Cir. 1977); *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166 (5th Cir. 1981); *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962); and *Farrell Lines v. Highlands Inc. Co.*, 696 F.2d 28 (2d Cir. 1982).

III. THE JURY INSTRUCTIONS IN THIS CASE DID NOT ADEQUATELY INSTRUCT THE JURY AS TO THE CARRIER'S DUTY OF PROPER DELIVERY

The jury instruction in this case failed to instruct the jury regarding the proper elements of the carrier's duty of proper delivery. The only instruction to deal with this point explicitly was Instruction No. 21, which defined the duty as "either to deliver the cargo to the consignee or to deliver it to a fit wharf and to take reasonable steps to safeguard it until the shipper or a consignee had a reasonable opportunity to claim the cargo."

This instruction neglects crucial elements of the duty of proper delivery. Two points of failure are especially notable. First, the instruction fails to mention the duty of proper delivery requires the carrier to notify the shipper/consignee of the cargo's arrival.

Numerous cases hold that this notification duty is an integral part of the duty of delivery. *E.g.*, *Atlantic Parco, Inc. v. Maersk Lines*, 740 F. Supp. 1002, 1991 AMC 148 (S.D.N.Y. 1990); *Insurance Co. of North America v. S/S Italica*, 567 F. Supp. 59 (S.D.N.Y. 1983). In the latter case a cargo of wine was discharged on a pier and the wine froze before it was picked up by the consignee. The carrier was liable for breach of its duty "to notify the consignee of the vessel's arrival and to protect the cargo..." Id. at 62.

Second, the delivery instruction fails to state that the duty of proper delivery means that the carrier has an affirmative duty of due care to protect the goods against loss or damage. *Italusa Corp. v. M/V Thalassini Kyra*, 733 F. Supp. 209, 1990

AMC 1356 (S.D.N.Y. 1990). This is not adequately expressed by the instruction which states only that the carrier was required to take "reasonable steps to safeguard" the cargo. The instruction, thus, did not adequately state the legal standard for proper delivery.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in order to explore the limits and resolve the conflicting interpretations of the courts regarding the impact of mandatory port regulations on the duty of proper delivery under COGSA and the Harter Act.

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Supreme Court, U. S.
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No. 97-228

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

GAMMA-10 PLASTICS, INC.,

Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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I. INTRODUCTION.

Annually, more than $575 billion of cargo is shipped from the United States to foreign ports. The decision of the court of appeals in the case at bar means that carriers of such shipments will be exonerated from their own negligence and breach of contract in handling such shipments if the carriers deliver the shipments into the custody of government agents of the foreign ports in accordance with the law of the port. The decision of the court of appeals, therefore, will seriously weaken the standard of care given by carriers to a significant portion of American shipments abroad. Shippers cannot be expected to bargain for stronger contract terms with ocean carriers to remedy this problem, for the very premise of the Harter Act, 46 U.S.C. § 190 *et seq.*, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*, is that shippers do not have sufficient bargaining power to overcome the strength of the carriers.

Thus APL cannot well argue against the exceptional national importance of the questions presented by Gamma-10's petition for a writ of certiorari. Instead, in opposing Gamma-10's petition, APL argues that the facts of the case at bar do not really raise the issues presented in Gamma-10's petition. According to APL, the jury found that APL did not improperly devan the cargo. Therefore, argues APL, for the reason that APL committed no wrongdoing, APL was not exonerated from any wrongdoing by its delivery of custody of the goods to a foreign port authority pursuant to the law of the port, and the issues presented by Gamma-10's petition are merely hypothetical. APL asserts that the evidence "proved" that Gamma-10's downfall was Gamma-10's own fault, because Gamma-10 was a defrauding purveyor of second-rate goods that nobody wanted.

If the Supreme Court agrees with Gamma-10 that the issues presented in Gamma-10's petition for a writ of certiorari are important, the Supreme Court must nevertheless be concerned by APL's argument that the jury's findings and the evidentiary proof render those issues merely hypothetical in the case at bar. Accordingly, Gamma-10 respectfully submits the following

Reply Brief for the purpose of demonstrating that the issues presented in the petition are indeed involved in the case at bar. To make this demonstration, Gamma-10 discusses the evidence and the jury's findings with more particularity than may be usual in connection with a petition for a writ of certiorari. Nevertheless, Gamma-10 knows no other way to establish the jarring falsity of APL's description of the jury's findings and of the underlying case. In order to decide Gamma-10's petition without misapprehension, this Court must know that APL's version of the case is not to be trusted.

II. APL'S FALSE STATEMENT OF THE CASE MUST NOT BE ALLOWED TO MISGUIDE THIS COURT INTO BELIEVING THAT THE QUESTIONS PRESENTED BY GAMMA-10'S PETITION ARE NOT AT ISSUE IN THIS CASE.

A. The Evidence Showed That Gamma-10's Goods Were Of Superior Quality, And That The Buyer Rejected Them Because They Had Been Devanned, Not Because Of Any Inherent Defect. The Jury Did Not Find Otherwise.

APL opens its Statement of the Case by asserting that "[t]he evidence proved ... that Gamma had misrepresented its recycled product," and that Gamma-10's losses were incurred, not because of APL's fault, but because Gamma-10's buyers refused to accept an inferior product. Respondents' Brief In Opposition (hereinafter "Resp. Br.") at 2. To assert that the evidence proved any such misrepresentation is itself a misrepresentation.

The fact is that customers and experts alike testified that the quality of Gamma-10's product was superior. *See* Trial Transcript (hereinafter "T"), Vol. XII, pp. 1444-45; deposition of Tom Mates, pp. 40-42, 51-52 (presented to the jury during trial). Further, there was no evidence that Gamma-10's product was "recycled." To the contrary, the expert testimony was that

Gamma-10's product was "virgin" material. *See* T Vol. XII, pp. 1440-41; T XXXI, p. 4559. It is true that APL presented an expert who initially testified that Gamma-10's product was recycled, but the expert later "backed up" from his testimony and agreed to a definition of "virgin alloy" that would encompass Gamma-10's product. *See* T of May 18, 1995, at pp. 59-60; *see also* T Vol. XXXI at pp. 4558-59.

The witnesses further testified that the only reason Gamma-10's buyer failed to accept the shipment was that the buyer (Vic International) and the consignee (China Kang Hua Investment) could not find the shipment.[1] The witnesses further testified that when they ultimately found the shipment, they found that the shipment had been decontainerized, exposed to the elements, and thereby contaminated. *See* T Vol. IV, pp. 665, 718-20; Vol. X, pp. 1276-1286; Plaintiff's Ex. 231 (photo of dumped cargo) reproduced in the Appendix hereto at RA1.

Plainly, APL has no business representing to this Court that "the evidence proved" that Gamma-10 exported recycled or inferior product, or that Gamma-10 had misrepresented its product, or that Gamma-10's losses were caused by the quality of its product rather than the degradation of the product that occurred after the product was prematurely devanned and exposed to the elements.

B. The Evidence Showed That Gamma-10 Had Buyers For The Goods. The Jury Did Not Find Otherwise.

APL further asserts that Gamma-10 did not have a buyer for the goods at the time of their arrival in Shanghai, or after: "There was no evidence that there even was a 'consignee' at any time

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[1]Gamma-10 had a multi-million dollar written contract with Vic International, prior to the shipments at issue, for Vic International to purchase the product. *See* T Vol. X at pp. 1239-47. In turn, Vic International had contracts to re-sell the products to various entities, including the consignee China Kang Hua Investment. *See id.* at pp. 1260; 1282-87.

prior to the ultimate sale in the summer of 1989, more than nine months after the goods had been delivered to Shanghai." Resp. Br. at 4; *see also* Resp. Br. at 2. The documents themselves prove the falsity of APL's assertion. Bill of Lading Number 155991 (Plaintiff's Ex. 32), reproduced in the Appendix hereto at RA2, is the bill of lading for the shipment that was supposed to arrive in containerized form in Shanghai. This Bill of Lading lists China Kang Hua Investment as "intermediate consignee." Further, a Vice President of Vic International testified that Vic International had $10 million worth of orders in hand from Chinese buyers for the goods that were to be shipped to Shanghai. *See* T Vol. X, pp. 1240-41; *see also* Plaintiff's Exhibit 281 (contract between China Kang Hua Investment and Gamma-10), reproduced in the Appendix hereto at RA3 - RA5.[2]

C. The Jury Did Not Find That APL Did Not Improperly Devan The Goods.

Most crucial of all, APL repeatedly asserts that the jury found, based on solid evidence, that APL or its agents did not improperly devan the goods. These assertions, too, are false. Because of their significance to APL's legal argument, Gamma-10 will address APL's assertions in this regard in the next section of this Reply Brief.

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[2]APL also mischaracterizes Gamma-10's claims. According to APL, Gamma-10 claimed only that APL lost Gamma-10's cargo. *See* Resp. Br. at 1, 2. In reality, Gamma-10 also claimed that APL caused damage to Gamma-10's cargo by devanning the cargo and by abusing its control over the cargo after delivery of custody to the Shanghai port authority. *See, e.g.*, Jury Instruction No. 22, contained in the Appendix to the Petition for Writ of Certiorari at A21. Further, APL states that only Jury Instruction 21 is at issue here, when in fact Jury Instruction 21A also exonerated APL from its duties. *Compare* Resp. Br. at 6-7, *with* Appendix to Petition for Writ of Certiorari at A19-A20.

For purposes of the Statement of the Case, the relevancy of APL's false assertions is not so much APL's falsity as it is the existence of more-than-substantial evidence (unmentioned by APL) on the basis of which the jury could have found, if not for the trial court's exculpatory instructions, that APL improperly devanned the goods and thereby caused damage to Gamma-10. Thus, as will be discussed below, this case does involve the exceptionally important commercial questions presented by Gamma-10's petition.

III. THIS CASE UNQUESTIONABLY DOES PRESENT THE QUESTIONS RAISED IN THE PETITION FOR A WRIT OF CERTIORARI.

A. This Case Presents The First Question In The Petition.

Gamma-10 seeks this Court's review of the decision of the court of appeals for the purpose of reviewing two questions. The first question is whether, in accordance with the decision of the court of appeals, an ocean carrier is exonerated from its own negligence and breach of contract in the shipment of cargo to a foreign port if the ocean carrier delivers the cargo into the custody of government agents in accordance with the law of the foreign port. For obvious reasons, the decision of the court of appeals, if it remains the law, will have a tremendous negative impact on the standard of care given by ocean carriers to the $575,000,000,000 of cargo shipped every year from the United States to foreign ports.

In the case at bar, Gamma-10 (the shipper) alleges that APL (the carrier) was negligent and in breach of contract because APL improperly "devanned" the cargo before delivering the cargo into the custody of the foreign governmental agents. In its brief in opposition to Gamma-10's Petition for Writ of Certiorari, APL argues that the issue of exoneration from negligence and breach of contract is not presented by the case at bar because, APL

repeatedly asserts, the jury found that APL had not improperly devanned the cargo. *See* Resp. Br. at i, 3, 5, 8, 9-10.

APL's assertion is demonstrably false. The jury did **not** find that APL had not improperly devanned the cargo. Thus the first question set forth in Gamma-10's petition for a writ of certiorari is definitely present in this case.

As is evident on its face, the jury's Special Verdict Form, reproduced at pages 1 and 2 of Respondents' Appendix, contains no finding one way or the other as to whether APL improperly devanned the goods. Accordingly, when APL asserts to this Court that "the jury resolved against Gamma" the contention that "APL improperly devanned the containers" (Resp. Br. at 2-3), APL is demonstrably wrong. *See also* Resp. Br. at 5, 8, 9-10.

True it is that the jury found that APL was not negligent and that APL did not breach its contract. Respondents' App. 1, 2. But these findings were made pursuant to jury instructions that in essence told the jury that APL had no duty concerning the cargo if APL delivered the cargo to foreign officials in accordance with foreign law. Without a duty, there can be no negligence or breach of contract. Because it was uncontested that APL did deliver the cargo to foreign officials in accordance with foreign law, the jury, in following the instructions at issue here, could not have found that APL violated any duty and thus could not have found that APL was negligent or in breach of contract. *See* Petition For Writ Of Certiorari at 4-8; Motion And Brief *Amicus Curiae* Of Professor Thomas J. Schoenbaum at 5.

Thus the jury's findings of no negligence and no breach of contract were not tantamount to a finding that APL did not improperly devan the cargo. Rather, because they presumably were made pursuant to the court's exculpatory jury instructions, the jury's findings of no negligence and no breach of contract give no indication one way or the other on the crucial issue of whether in fact APL improperly devanned the goods.

Yet there unquestionably was sufficient evidence for the jury to find that APL had dumped the goods before they were in the custody of the Shanghai Port Authority. APL's own documents

showed that APL had devanned the goods prior to their arrival in Shanghai. *See* Plaintiff's Trial Exhibits 38, 41, 42, 43, and 45; T Vol. IX, pp. 1108, 1110-11, 1114, 1116. Additionally, APL's CEO testified that what APL now calls "erroneous computer entries" (Resp. Br. at 3) meant that the containers "had been emptied out" and had arrived empty in Shanghai, and that no APL employee ever had input into the computer a report that a container was empty when it actually was full. *See* Deposition of Joji Hayashi (presented to the jury at trial), pp. 46-52. Further, APL's PRC manager, K.K. Cheng, admitted that he did not know who broke open the seals on the containers, that the containers were emptied in Hong Kong before going to Shanghai, and that he had "no factual basis for doubting the accuracy of any of the information in that [computer] report." *See* T of May 15, 1995, at p. 5; T of May 16, 1995, at p. 53; Deposition of K.K. Cheng at pp. 33-35 (read to the jury).[3] The evidence also included uncontroverted testimony that APL's agent had expressly ordered and caused Chinese authorities to devan (dump) a related shipment in Whampoa, China, prior to delivery and in violation of Chinese law. *See* T of June 17, 1993, at pp. 1190-1194; 1236 (read to the jury).

Thus it is clear that the evidence in this case would sustain a verdict that APL had improperly devanned the cargo, and that the devanning caused the cargo to be damaged. The jury was not asked to decide whether APL had improperly devanned the cargo, however, but was instead instructed that APL's delivery of the goods into the custody of port authority in accordance with port law exonerated APL from liability "for any damage or loss that occurred after the port authority took possession." Jury Instruction 21; *see also* Jury Instruction 21A, appended to the

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[3]APL's evidence to the contrary was incredibly weak. APL cites (Resp. Br. at 3) the direct testimony of K.K. Cheng and Chen Chou Hua. Both witnesses admitted on cross that in reality they had no personal knowledge about the shipments at issue. *See* T of April 10, 1995, at 4-8; T Vol. XXIX at 4282-83.

Petition for Writ of Certiorari at A19, A20. The problem with the jury instructions affirmed by the court of appeals is that the instructions required the jury to find a "proper delivery" regardless of whether Gamma-10's cargo was removed from the sealed containers by APL in Hong Kong (or elsewhere) as long as the cargo was ultimately delivered into the custody of the Chinese port authority in Shanghai and the ultimate loss or damage was accomplished while the goods were in the custody of the port authority.

This case, therefore, very much does present the exceptionally important question whether the *Tan Hi* doctrine may be invoked to insulate a carrier from liability under the Harter Act and the Carriage of Goods by Sea Act for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the damage is caused by the carrier's own mishandling of the goods prior to their delivery into the custody of the local government agents. When APL asserts otherwise, APL is demonstrably wrong.

B. This Case Presents The Second Question In The Petition.

The second question presented by Gamma-10's petition for a writ of certiorari is whether a carrier should be insulated from liability for subsequent damage to goods delivered into the custody of government agents in accordance with the law of the foreign port, when the carrier retains control (but not custody) over the goods at all times.

In arguing that this second question is not present in the case at bar, APL suggests that there is no "evidence which would support the contention that APL retained 'control' of the goods after delivery to the container yard in Shanghai." Resp. Br. at 16-17. In fact, APL admitted that the Shanghai port authority acted as its "agent," that APL had the power to instruct its "agent" as to the disposition of goods, and even that its use of its power to cause its "agent" to hold Gamma-10's goods was

"illegal." *See* T of May 16, 1995, at p. 49; *id.* at p. 82, contained in the Appendix hereto at RA6 - RA7; T Vol. XV p. 2026; Plaintiff's Ex. 170, contained in the Appendix hereto at RA8. Plainly, therefore, APL had control over the goods.[4]

Finally, APL suggests that this Court should not attempt to define any aspect of the duty of proper delivery imposed by the Harter Act, 46 U.S.C. § 190 *et seq.*, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* Resp. Br. at 17-18. APL argues that the issue of proper delivery is not present in this case and could only be decided on an advisory and hypothetical basis, *id.*, but, as discussed above, the issue of what constitutes proper delivery to a foreign port is very much present in this case.

APL also argues that the issue of proper delivery is one of contract, custom, and port usage. *Id.* APL is wrong as a matter of law. The standard of "proper delivery" is one set by the Congress in the Harter Act and the Carriage of Goods by Sea Act. The standard cannot be undermined by contract, custom, or port usage. *See Allied Chem. Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir. 1985).

APL then contradictorily argues, first, that the standard of "proper delivery" is too broad and varied to admit of definition, and, second, that the definition of "proper delivery" is for

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[4]APL also argues that Gamma-10 has not previously raised any claim that APL is liable to Gamma-10 because of APL's control over the persons who took custody of the cargo in Shanghai. Resp. Br. at 17. In fact, however, Jury Instruction No. 22, reprinted in the Appendix to the Petition For Writ Of Certiorari at A21, states that Gamma-10 alleges that APL's conduct was negligent because "American President Lines **or its agents**" undertook or failed to undertake certain actions (emphasis supplied). Gamma-10's evidence, as discussed above, was that the persons at the Shanghai port authority who took custody of the cargo did so as APL's agents, and were subject in fact to APL's control. APL's attorney himself argued the control issue in his closing argument. *See* T Vol. XXXIII at p. 4720.

Congress, not this Court. Resp. Br. at 18. The standard of "proper delivery" was established by Congress in the Harter Act and the Carriage of Goods by Sea Act. It is the function of the judicial branch to interpret that standard.

The court of appeals has interpreted the standard of "proper delivery" to mean that carriers are exonerated from their own negligence and breach of contract if they deliver goods to foreign port authorities in accordance with foreign port law. This interpretation is at odds with the statutes, with other courts of appeals, and with the self-evident commercial need to prevent future misconduct by carriers in shipments that may total more than $575,000,000,000 per year. There is, therefore, a pressing need for this Court to give its authoritative reading of the statutory standard.

Respectfully submitted,

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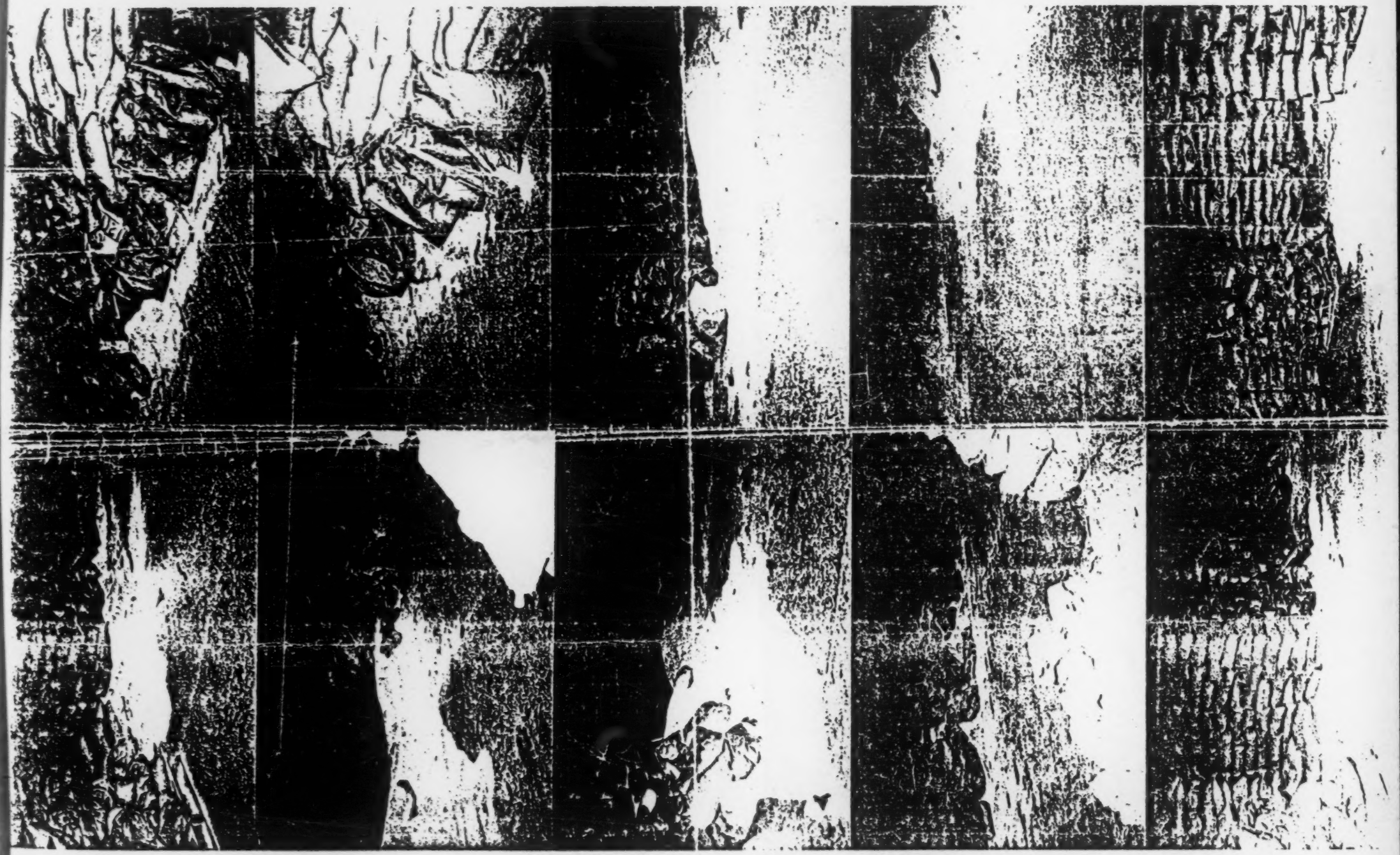
RA1



BEST AVAILABLE COPY

AMERICAN PRESIDENT LINES, LTD. — OCEAN BILL OF LADING

SHIPPER (Principal or Seller licensee and full address)

GAMMA-IC PLASTICS, INC.
10026 UNIVERSITY AVE. N.W.
MINNEAPOLIS, MN 55433

BOOKING NUMBER: 155991

B/L NUMBER: 155991

EXPORT REFERENCES

CONSIGNEE (Name and Full Address/Non-negotiable Unless Consigned to Order.)
(Unless provided otherwise, a condemnation "To Order" means To Order of Shipper.)

TO ORDER

FORWARDING AGENT (References, F.M.C. No.)

POINT AND COUNTRY OF ORIGIN OF GOODS

U.S.A. THC

NOTIFY PARTY/INTERMEDIATE CONSIGNEE (Name and Full Address)

CHINA KANG HUA INVESTMENT & IMP & EXP
CORP SHANGHAI BRANCH
RM 56324 JING-JIANG CLUB
SHANGHAI CHINA

ALSO NOTIFY (Name and Full Address) /DOMESTIC ROUTING/
EXPORT INSTRUCTIONS/PIER — TERMINAL/ONWARD ROUTING
FROM POINT OF DESTINATION

RA2

INITIAL CARRIAGE (MODE)*	PLACE OF RECEIPT*
	ATLANTA
EXPORT CARRIER (Vessel, voyage, & flag)	**PORT OF LOADING**
PRES. MONROE V054 USA	LOS ANGELES
PORT OF DISCHARGE	**PLACE OF DELIVERY***
SHANGHAI	SHANGHAI, PRC

PARTICULARS FURNISHED BY SHIPPER

MKS.& NOS./ CONTAINER NOS.	NO. OF PKGS.	H M	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMEA
	4400		BAGS UA39-340C SLAC CY/CY POLYPROPYLENE RESIN INJECTION GRACE (CC-POLYMER) GRADE GP-10	103294 KG 227724 LB	181. 640C.
			103.294 MT GROSS WEIGHT 101.2 MT NET WEIGHT		
			FREIGHT PREPAID		
CTR NBR	**SEAL NBR**		T/S MODE QUANT/TYPE		
APLU7C1555	5786		C4C CY/CY 880 BAGS		
APLU7C5245	5771		C4C CY/CY 880 BAGS		
APLU8C2185	5785		C4C CY/CY 880 BAGS		
APLU8C3101	SCI9517		D4C CY/CY 880 BAGS		
SCXU5C1204	9512		C4C CY/CY 880 BAGS		

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PEOPLE'S REPUBLIC OF CHINA DIVERSION CONTRARY TO U.S. LAW PROHIBITED. ** NON-NEGOTIABLE
ON SCAC PRES. MONROE V054 SEP. 09, 1988

B/L TO BE RELEASED AT CHI — OCEAN FREIGHT PAYABLE AT CHICAGO, IL

FREIGHT RATES CHARGES, WEIGHTS AND/OR MEASUREMENTS (SUBJECT TO CORRECTION)	PREPAID U.S. $	COLLECT U.S. $	Local Currency
C1 103.292KT @ 162/KT	16733.30		

EXHIBIT Plaintiff 32 3-90-CV-408

PLAINTIFF'S EXHIBIT 32 3-90-CV-408

0145

CS	DEST	CC	TOTAL PREPAID	$	16733.30		
Vessel	Voyage	Office	TOTAL COLLECT				

01437 SDS HJC SEA Y

The undersigned Carrier hereby acknowledges the receipt (condition or exception or other as noted to contain the Goods described above in external good order and condition unless noted. The Shipper agrees, and the Consignee, person purchasing this instrument for value only, or otherwise having an interest in or control over the vessel, cargo, carriage of the Goods are subject to all the terms and as set forth and incorporated by reference on the reverse hereof, whether written, typewritten

A set of 3 originals of this bill of lading issued by said Carrier. Upon surrender to of any one negotiable bill of lading, properly all others shall stand void.

AMERICAN PRESIDENT LINES

By: Authorized Rep. of Carrier o

Date and Place Issued: OCT. 4, CHICAGO,

中国保华大系公司

上海分公司

CHINA KANGHUA INVESTMENT & IMP & EXP CORP SHANGHAI BRANCH

RA3

TO: MR. JOSEPH KOPSTEIN-PRESIDENT
GAMMA-10 PLASTICS INC.
FAX: (612)921-2424 USA

FM: BAI XIAO JIA-GENERAL MANGER
CHINA KANGHUA INVESTMENT & IMP. & EXP. CORP.
SHANGHAI BRANCH

DEAR JOSEPH

WE WERE GLAD TO MEET YOU AND VICTOR CHIANG IN SHANGHAI AT 28/29 NOVEMBER.

HERE ARE THE SUMMARY, DIGESTED FROM OUR VARIOUS MEETING & CONVERSATION SINCE SEPT. 1988.

1. KANGHAU WILL ORDER 5 CONTAINERS GP-10 SUBJECT TO SHANGHAI SEND-DE PLASTIC FACTORY'S TEST REPORT.
2. GAMMA-10 WILL AUTHORIZE TO RELEASE CONTAINERS TO KANGHUA TO AVOID FURTHER DEMURRAGE & CUSTOM DUTY DELAY PENALTIES.
3. KANGHUA WILL PRE-PAY THE CUSTOM DUTY & OTHER MISC. COSTS DIRECTED TO THE RELAESE OF GOODS FROM SHANGHAI PORT.
4. SHANDE WILL RUN THE TEST & ISSUE TEST REPORT WITHIN 10 DAYS AFTER THEY RECEIVE 10 BAGS SMAPLE.
5. KANGHUA AGREES TO BANK WIRE TRANSFER THE TOTAL AMOUNT TO GAMMA-10 'BANK ACCOUNT AFTER RECEIPT OF TEST REPORT APPROVAL ASAP.
6. GAMMA-10 AGREES GP-10 AT PREVILEGED PRICE TOKANGHUA EVERY MONTH FOR THE NEXT 12 MONTH BEGINNING DEC. 1988.
7. KANGHAU WILL PURCHASE UPON CUSTMR'S FURTHER REQUIRMENT GP-10 FROM GAMMA-10 FOR THE NEXT 12 MONTHS STARTING DEC. 88.
8. 5 CONTAINER OF GP-10 PRICE WILL BE SET AT THE MIDDLE PP CHINA MARKET PRICE. TODAY THE PRICE WILL BE BETWEEN ¥8,000.00-9,000.00/MT, APPROX. US$1,050.00-1,115.00. KANGHUA CAN SELL ABOVE THE MIDDLE PP MARKET PRICE. GAMMA-10 AGREES TO SPLIT 50% FOR THE ABOVE PORTION.
9. KANGHUA WILL HANDLE FOREIGN EXCHANGE THE RATE AVLAILE CHINA FOREIGN

中國康華实業公司

上海分公司

RA4

CHINA KANGHUA INVESTMENT & IMP & EXP CORP SHANGHAI BRANCH

EXCHANGE ADJUSTED MARKET RATE.

* OUR KANGHUA CORP. IS ONE OF THE LARGEST COMPANY UNDER DIRECT SUPERVISION O THE STATE DEPARTMENT . OUR BANKERS THE BANK OF CHINA. IN CONCLUSION, IT I MY GREAT PLEASURE TO BEGIN DOING BUSSINESS WITH YOU. WE EXPECT AND DESIRE VERY LONG TERM AND MUTUALLY BENIFICIAL RELATIONSHIP.

SINCERELY YOURS

GENERAL MANGER.
TECHNICAL DEPT.
KANGHUA CORP.

INTRODUCTION

[illegible]

[illegible]

[illegible]

KANGHUA'S IMPORTS.

1. Electronic Equipment:
   - Computer system equipment and spares and computer instrument of various specifications
   - Wire and wireless communication instrument and peripheral devices.
2. Instruments and Meters.
   - Electronic instruments
   - Optical instruments
   - Laboratory instruments
   - Meteorological instruments
   - Measure instruments
   - Medical control instruments and meter
   - Instruments and meters of other kind
3. Electronic components and developing digital circuits.
4. Product of machinery and equipment
5. Medical equipment and medicine
   - Medicines
   - Pharmaceutical machines and packing materials.
   - Medical appliances
   - Medical equipment and hospital equipment
6. Appliance of daily life for the handicapped
7. Traffic and entertainment equipment to the handicapped.
8. Sound and video recording equipment used about TV system.
9. Equipment for the enterprises in the Fund for the handicapped.

KANGHUA'S EXPORTS:

1. Leather and leather products
2. Garments (limited to countries and region without import quota restrictions)
3. Canned food (except mushroom and raw and canned mushrooms.
4. Preserved and dried fruits
5. Drugs
6. Hand-plaited straw articles, basketry and bamboo, wicker and rush, clay figures, metal and chinaware, calligraphy and painting
7. Chemical appliances
8. Cosmetics
9. Recreation and sports articles
10. Computer, computer peripherals and simple software
11. Electrical special equipment, communication equipment, electrical components and parts, optical material
12. Medical apparatus and recovering equipment
13. Plastic & rubber finished products
14. Glass, marble slab and ceramic
15. Slag cinder, silica, waste fog and iron slag wool and mineral wool
16. Various incense coils, burning resistor and electric mosquito
17. Snake venom, pearl, bear and snake gallbladder
18. Raw refined oil
19. Products produced by the criminals' labor for the handicapped

K.K. CHENG-CROSS

[p. 82] Yes, Page 38 of your deposition from just January of this year. I have it on videotape and I'm going to ask you to follow along and ask if you made the following statement under oath in response to that question.

Page 38, Line 13.

You were asked the following questions and you gave the following response.

(The video deposition commenced playing at the above-referenced page and line, and concluded, and the Cross Examination continued, as follows:)

BY MR. SCOTT JOHNSON:

Q Now, those are the statements you made under oath in January of this year. Isn't it true, sir?

A Yes.

Q So the position that you took in 1988 that the cargo in other ports in China would not – would have to be paid for before even a small portion of the Shanghai cargo was released, you understood that to be an illegal position under American maritime law. Correct?

A Yeah, we are talking about the two shipment in China. Am I right?

One is in Shanghai, one is in Whampoa.

Q Yes.

A Okay.

Q My question to you is: You understood that under

* * *

EXHIBIT

Plaintiff 170

[LOGO]
AMERICAN PRESIDENT LINES, LTD.

TO: MR. JOE KOPSTEIN
C/O ROOM 2803
SHANGHAI HILTON
FAX NO. 21-55-3848

RE: B/L 155769 & 155991

HAVE CONTACTED OUR NAM OFFICE REGARDING YR REQUEST OF RELEASING 3 M/T OUT OF B/L 155769 TO YR BUYER IN GUANGZHOU AND 100 M/T OUT OF B/L 155991 IN SHANGHAI.

APL NEEDS U TO SETTLE ALL THE BILLS (INCLUDING STORAGE COSTS) BEFORE WE CAN INSTRUCT OUR AGENT IN PRC TO RELEASE SUBJECT SHIPMENT.

RGDS.

KK CHENG

EXHIBIT NUMBER Cashman 20
DATE 3 Aug 92
COURT REPORTER
RITA GOURLAY